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6
7 **UNITED STATES DISTRICT COURT**

8 **DISTRICT OF NEVADA**

9 KIRSTIN BLAISE LOBATO,

CASE NO. 2:19-cv-01273-RFB-EJY

10
11 Plaintiff,

12 vs.

13 LAS VEGAS METROPOLITAN POLICE
14 DEPARTMENT, THOMAS THOWSEN,
15 and JAMES LaROCHELLE,

16 Defendants.
17

18 **LVMPD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

19 Defendants Las Vegas Metropolitan Police Department ("LVMPD"), Thomas
20 Thowsen ("Det. Thowsen") and James LaRochelle ("Det. LaRochelle") (cumulatively
21 "LVMPD Defendants"), by and through their attorneys of record, Marquis Aurbach Coffing,
22 hereby file their Motion for Summary Judgment. This Motion is made and based upon the
23 pleadings and papers on file herein, the attached Memorandum of Points & Authorities, and
24 any oral argument allowed by counsel at the time of hearing.
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TABLE OF CONTENTS

MEMORANDUM OF POINTS & AUTHORITIES	1
I. INTRODUCTION	1
II. STATEMENT OF FACTS	1
A. THE MURDER OF DURAN BAILEY.	1
B. DETECTIVES THOWSEN AND LAROCHELLE'S INVESTIGATION.	3
1. Witness Interviews.....	3
2. Det. Thowsen's Additional Investigation.	12
C. PRELIMINARY HEARING.	13
D. LOBATO'S 2002 CRIMINAL TRIAL.	13
1. The State's Case-In-Chief.....	13
2. Lobato's Case-In-Chief.	22
3. State's Rebuttal Witnesses.....	28
4. The Verdict.	28
5. The Appeal of the 2002 Criminal Trial.	29
E. 2006 CRIMINAL TRIAL.....	29
1. State's Case-In-Chief.....	29
2. Lobato's Case-In-Chief.	40
3. The Verdict.	47
4. The Appeal.....	47
F. THE EVIDENTIARY HEARING.	48
G. AFTERMATH.	49
1. The Dismissal of the Criminal Charges.....	49
2. Clark County Conviction Review Unit.....	49
III. LEGAL STANDARDS	50
A. SUMMARY JUDGMENT STANDARDS.	50

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	B.	42 U.S.C. §1983 STANDARDS.....	50
2	IV.	LEGAL ARGUMENT.....	51
3	A.	COUNT I: 42 U.S.C. §1983 INVOLUNTARY CONFESSION.....	52
4	1.	Fifth and Fourteenth Amendment Coercive Interrogation Law.	52
5	2.	Both Lobato and Her Experts Agree that the Detectives Did Not Coerce a False Statement.....	54
6	3.	Qualified Immunity.	56
7	B.	COUNT II: PLAINTIFF'S 42 U.S.C. §1983 DUE PROCESS/DENIAL OF FAIR TRIAL CLAIM	57
8	1.	Relevant Fourteenth Amendment Law.....	58
9	2.	Analysis of Lobato's Fabrication of Evidence Claim.....	59
10	3.	The Detectives Are Entitled to Qualified Immunity on the Fabrication of Evidence Claim.	64
11	C.	COUNT III: 42 U.S.C. §1983 CONTINUED DETENTION WITHOUT PROBABLE CAUSE CLAIM.	65
12	1.	Relevant Fourth Amendment law.....	66
13	2.	Analysis of Lobato's Fourth Amendment Lack of Probable Cause Claim.....	66
14	D.	COUNT IV: 42 U.S.C. §1983 FAILURE TO INTERVENE.....	68
15	1.	Relevant Failure to Intervene Law.	68
16	2.	Analysis of Lobato's Failure to Intervene Claim.	69
17	E.	COUNTS V AND IX: 42 U.S.C. §1983 CONSPIRACY CLAIM AND STATE LAW CONSPIRACY CLAIM.....	69
18	1.	Relevant Conspiracy Law.....	69
19	2.	Analysis of Lobato's Civil Conspiracy Claim.....	70
20	F.	COUNT VI: STATE LAW MALICIOUS PROSECUTION.....	72
21	1.	Relevant Malicious Prosecution Law.	72
22	2.	Analysis of Lobato's Malicious Prosecution Claim.	73
23	G.	COUNT VII: STATE LAW ABUSE OF PROCESS.....	73
24	1.	Relevant Abuse of Process Law.	73
25			
26			
27			

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	2.	Analysis of Lobato’s Abuse of Process Claim.	74
2	H.	COUNT VIII: STATE LAW IIED.	75
3	1.	Relevant IIED Law.	75
4	2.	Analysis of Lobato’s IIED Complaint.	75
5	I.	COUNT X: INDEMNIFICATION.	75
6	V.	CONCLUSION.	76
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			

TABLE OF AUTHORITIES**Cases**

<i>Albright v. Oliver</i> , 510 U.S. 266 (1994).....	50, 51
<i>Awabdy v. City of Adalanto</i> , 368 F.3d 1062 (9th Cir. 2004)	72
<i>Baker v. McCollan</i> , 443 U.S. 137 (1979).....	66
<i>Beck v. v. City of Upland</i> , 527 F.3d 853 (9th Cir. 2008)	59, 63
<i>Borunda v. Richmond</i> , 885 F.2d 1384 (9th Cir. 1989)	51
<i>Bradford v. Davis</i> , 923 F.3d 599 (9th Cir. 2019)	53
<i>Briscoe v. Madrid</i> , 1:17-CV-0716-DAD-SKO, 2018 WL 4586251 (E.D. Cal. Sep. 21, 2018).....	69
<i>Bull v. McCuskey</i> , 615 P.2d 960 (Nev. 1980).....	74
<i>Caldwell v. City and Cty. of San Francisco</i> , 889 F.3d 1105 (9th Cir. 2018)	58, 59, 63, 65
<i>Cefalu v. Village of Elk Grove</i> , 211 F.3d 416 (7th Cir. 2000)	70
<i>Celotex v. Catrett</i> , 477 U.S. 317 (1986).....	50
<i>Chavez v. Martinez</i> , 538 U.S. 760 (2003).....	53, 57
<i>Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.</i> , 971 P.2d 1251 (Nev. 1988).....	70
<i>Cooper v. Dupnik</i> , 963 F.2d 1220 (9th Cir. 1992)	57
<i>Costanich v. Dep't. of Soc. & Health Servs.</i> , 627 F.3d 1101 (9th Cir. 2010)	65
<i>Crowe v. Cty. of San Diego</i> , 593 F.3d 841 (9th Cir. 2010)	53

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	<i>Cunningham v. City of Wentachee</i> , 345 F.3d 802 (9th Cir. 2003)	53
2		
3	<i>Cunningham v. Gates</i> , 229 F.3d 1271 (9th Cir. 2003)	68
4	<i>Cunningham v. Perez</i> , 345 F.3d 802 (9th Cir. 2003)	56, 57
5		
6	<i>Daniels v. Williams</i> , 474 U.S. 327 (1986).....	64
7	<i>Dental v. City Salem</i> , No. 3:13-CV-01659-MO, 2015 WL 1524476 (D. Or. Apr. 2, 2015)	69
8		
9	<i>Devereaux v. Abbey</i> , 263 F.3d 1070 (9th Cir. 2001)	50, 58, 59
10	<i>Dutt v. Kremp</i> , 844 P.2d 786 (Nev. 1992).....	74
11		
12	<i>Fazaga v. FBI</i> , 965 F.3d 1015 (9th Cir. 2020)	71
13	<i>Freeman v. Santa Ana</i> , 68 F.3d 1180 (9th Cir. 1995)	66
14		
15	<i>Galbraith v. Cnty. of Santa Clara</i> , 307 F.3d 1119 (9th Cir. 2002)	72
16	<i>Gausvik v. Perez</i> , 345 F.3d 813 (9th Cir. 2003)	58, 65
17		
18	<i>Gillette v. Malheur Cty.</i> , 2:14-CV-01542 -SU, 2016 WL 3180228 (D. Or. 2016).....	69
19	<i>Gladden v. Holland</i> , 366 F.2d 580 (9th Cir. 1966)	57
20		
21	<i>Hall v. City of Los Angeles</i> , 697 F.3d 1059 (9th Cir. 2012)	59
22	<i>Hand v. Gary</i> , 838 F.2d 1420 (5th Cir. 1988)	73
23		
24	<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	51
25	<i>Harris v. Roderick</i> , 126 F.3d 1189 (9th Cir. 1997)	72
26		
27	<i>Hasbrouck v. Yavapai Cty.</i> , 2021 WL 321894 (D. Az. Feb. 1, 2021)	71

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	<i>Haynes v. Washington</i> , 373 U.S. 503 (1963).....	53
2	<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994).....	74
3	<i>Hofmann v. City and Cty. of San Francisco</i> , 870 F.Supp.2d 799 (N.D. Cal. 2012).....	71
4	<i>Howell v. Tanner</i> , 650 F.2d 610 (5th Cir. 1981)	66
5	<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991).....	51
6	<i>Juan H. v. Allen</i> , 408 F.3d 1262 (9th Cir. 2005)	53, 57
7	<i>Lacy v. County of Maricopa</i> , 631 F.Supp.3d 1183 (D.Az. 2008).....	68
8	<i>Lal v. California</i> , 746 F.3d 1112 (9th Cir. 2014)	51
9	<i>LaMantia v. Redisi</i> , 118 Nev. 27, 38 P.3d 877 (2002).....	72, 74
10	<i>Lassiter v. City of Bremerton</i> , 556 F.3d 1049 (9th Cir. 2009)	72
11	<i>Lolli v. Cty. of Orange</i> , 351 F.3d 410 (9th Cir. 2003)	68
12	<i>Marschall v. City of Carson</i> , 86 Nev. 107, 464 P.2d 494 (1970).....	66
13	<i>Milke v. City of Phoenix</i> , No. CV-15-00462-PHX-ROS, 2016 WL 5339693 (D.Az. Jan. 8, 2016)	69
14	<i>Mirch v. Clifton</i> , 2015 WL 6681231 (Nev. 2015).....	74
15	<i>Murray v. Schriro</i> , 745 F.3d 984 (9th Cir. 2014)	57
16	<i>Nev. Credit Rating Bureau, Inc. v. Williams</i> , 88 Nev. 601, 503 P.2d 9 (1972).....	74
17	<i>Newman v. Cty. of Orange</i> , 457 F.3d 991 (9th Cir. 2006)	63
18	<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	66

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	<i>Posadas v. City of Reno,</i>	
2	851 P.2d 438 (Nev. 1993).....	74
3	<i>Rabkin v. Dean,</i>	
4	856 F.Supp. 543 (N.D. Cal. 1994).....	71
5	<i>Rashid v. Albright,</i>	
6	818 F. Supp. 1354 (D. Nev. 1993).....	73
7	<i>Rowland v. Lepire,</i> 313 P.2d 1332 (Nev. 1983)	73
8	<i>Ruble v. Escola,</i>	
9	898 F.Supp.2d 956 (N.D. Ohio 2012)	71
10	<i>Scafidi v. Las Vegas Metro Police Dep't.,</i>	
11	966 F.3d 960 (9th Cir. 2020)	67
12	<i>Shiels v. City of New York,</i>	
13	141 A.D. 3d 421, 35 N.Y.S. 3d 330 (1st Dept. 2016)	74
14	<i>Sims v. City of Columbus,</i>	
15	2013 WL 3394001 (S.D. Ohio July 8, 2013).....	76
16	<i>Sloman v. Tadlock,</i>	
17	21 F.3d 1462 (9th Cir. 1994)	63
18	<i>Smiddy v. Varney,</i>	
19	665 F.2d 261 (9th Cir. 1981)	1, 59, 63, 72
20	<i>Smith v. Almada,</i>	
21	640 F.3d 931 (9th Cir. 2011)	72
22	<i>Smith v. Gomez,</i>	
23	550 F.3d 613 (7th Cir. 2008)	70
24	<i>Star v. Rabello,</i>	
25	97 Nev. 124, 625 P.2d 90 (1981).....	75
26	<i>Stoot v. City of Everett,</i>	
27	582 F.3d 910 (9th Cir. 2009)	53, 57
	<i>Stuart v. City of Scottsdale,</i>	
	2021 WL 977166 (D.Az. March 16, 2021)	71
	<i>Taylor v. Maddox,</i>	
	366 F.3d 992 (9th Cir. 2004)	56
	<i>Terry v. Ohio,</i>	
	392 U.S. 1 (1968).....	66
	<i>Ting v. United States,</i>	
	927 F.2d 1504 (9th Cir. 1991)	70

MARQUIS AURBACH COFFING

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1	<i>Tobias v. Arteaga</i> , 996 F.3d 571 (9th Cir. 2021)	53
2		
3	<i>Torres v. City of Madera</i> , 648 F.3d 1119 (9th Cir. 2011)	51
4	<i>U.S. v. Koon</i> , 34 F.3d 1416 (9th Cir. 1994)	68
5		
6	<i>U.S. v. Koon</i> , 518 U.S. 81 (1996).....	68
7	<i>United States v. Haswood</i> , 350 F.3d 1024 (9th Cir. 2003)	53
8		
9	<i>Von Williams v. City of Albany</i> , 936 F.2d 1256 (11th Cir. 1991)	64
10	Constitutional Provisions	
11	Fifth Amendment.....	52, 53, 54, 56, 57
12	Fourteenth Amendment	51, 52, 53, 54, 56, 57, 58, 59
13	Fourth Amendment	66, 68, 69
14	Rules	
15	Fed.R.Civ.P. 56.....	50
16	Fed.R.Civ.P. 56(a)	50
17	Fed.R.Civ.P. 56(c)(1)(A) and (B).....	50
18	Statutes	
19	42 U.S.C. §1983.....	1, 50, 51, 52, 57, 64, 65, 68, 69, 71, 72, 73
20	42 U.S.C. §1985.....	71
21	42 U.S.C. §1985(3).....	71
22	NRS 41.0349.....	76
23	Treatises	
24	Prosser & Keaton, LAW OF TORTS (1984)	73, 74
25		
26		
27		

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816**MEMORANDUM OF POINTS & AUTHORITIES****I. INTRODUCTION**

This is a 42 U.S.C. §1983 wrongful conviction lawsuit. Two separate juries found plaintiff, Kirsten Blaise Lobato (“Lobato”), guilty of murder with the use of deadly weapon and sexual penetration of a dead human body. Years later, the Supreme Court of Nevada overturned Lobato’s conviction finding that her criminal defense attorneys failed her by neglecting to retain expert entomologists who could challenge the State’s experts regarding the time of death. Despite the State’s continuing belief in Lobato’s guilt, it recognized that “by the time a third trial could proceed, [Lobato] would be immediately eligible for parole if convicted again.” Therefore, it dropped all criminal charges. Lobato has never been declared innocent of the underlying crime.

Lobato is now suing Det. Thowsen and Det. LaRochelle who arrested her in 2001. Lobato alleges that the Detectives framed her for the murder by coercing her confession, intimidating witnesses, fabricating evidence, and withholding evidence. Lobato raised these same issues in both of her criminal trials and was soundly rejected by both the trial court and the Supreme Court of Nevada. There is absolutely no evidence that the Detectives violated the Constitution or Nevada state law. As the Ninth Circuit recognized over forty-years ago in these types of cases, “[a] police officer’s lot already is unfortunate because it is he who often is the only actor in the chain of decisions leading to prosecution who is subject to section 1983 liability. We need not make it more unfortunate by holding the officer liable for damage that is the result of the intervening fault of others in the chain.” *See Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981). The Detectives (and LVMPD) now request summary judgment on all claims brought against them.

II. STATEMENT OF FACTS**A. THE MURDER OF DURAN BAILEY.**

On the night of July 8, 2001, Richard Shott (“Shott”) was dumpster diving in the area of 4240 West Flamingo Road, near a Nevada State Bank and across the street from the

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 Palms Hotel and Casino, when he saw the stomach of what he believed was a dead body
2 behind the dumpster. (2006 Criminal Jury Trial Transcript, at IV:54-55, 56, **Exhibit A**¹.)
3 Shott immediately left and went to the Terrible Herbst gas station a block away. (*Id.* at
4 IV:57.) Not knowing what to do, Shott eventually called 911 two hours later, at 10:36 p.m.
5 (*Id.* at IV:58, 63, 64.)

6 Officer James Testa (“Testa”), a field training officer with LVMPD, was dispatched
7 to the scene of a sick or injured person at approximately 10:45 p.m. (*Id.* at IV:108, 109.)
8 He met with Shott, who showed him where the body was. (*Id.* at IV:110-11.) Testa moved
9 the dumpster to access the body, and immediately saw several spots of blood, some shoe
10 prints, and a foot sticking out. (*Id.* at IV:116-117.) Testa noticed blood so he backed away
11 and called for medical assistance. The fire department confirmed that the person was dead.
12 (*Id.* at IV:118-19.) Testa testified that although he indicated to the medical team where to
13 step, there was low light, and it was possible that someone could have stepped in areas they
14 shouldn’t have. (*Id.* at IV:151.) Testa further testified that there was some saran or plastic
15 wrap around part of the body. (*Id.* at IV:140, 152.) The victim was later identified as Duran
16 Bailey (“Bailey”), a homeless man who lived in that area. (*Id.* at IV: 67, 75.) Bailey was
17 5’10” and weighed 133 pounds at time of death. (*Id.* at IV: 42.)

18 On July 9, 2001, an autopsy was performed on Bailey by Chief Medical Examiner
19 Lary Simms, M.D. (“Dr. Simms”). The autopsy revealed that Bailey suffered: (1) multiple
20 traumas to his face including stab wounds and abrasions/contusions; (2) trauma to his teeth
21 (missing teeth); (3) left side skull fracture; (4) laceration to left side of his neck; (5) four stab
22 wounds to his abdomen; (6) left hand lacerations (defensive wounds); (7) severed penis;
23 (8) laceration to the anus; (9) laceration to the scrotum; and (10) back abrasions. Dr. Simms
24 concluded the cause of death to be blunt trauma to the head and stab wound to the neck. He

25
26
27 ¹ Relevant portions of Lobato’s 2006 criminal trial transcript are attached as Exhibit A. The citation refers to the volume and the page. So, a reference to page 1 of Volume I of the 2006 criminal trial will be cited as “Ex. A at I:1.”

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1 also opined that the injuries to Bailey's penis and anus were postmortem. Dr. Simms
2 labeled the death a "homicide." (Autopsy Report of Dr. Simms, **Exhibit B.**)

3 **B. DETECTIVES THOWSEN AND LAROCHELLE'S INVESTIGATION.**

4 Detectives Thowsen and LaRochelle were assigned to the Bailey homicide
5 investigation on July 8, 2001. The Detectives traveled to the site of the investigation,
6 supervised the documenting of the scene, and interviewed witnesses.

7 **1. Witness interviews.**

8 **a. Richard Shott.**

9 The Detectives interviewed Shott and obtained a voluntary statement. Det. Thowsen
10 examined Shott for evidence of blood and photographed him. No evidence was found
11 implicating Shott in the crime. (LVMPD Officer's Report at 13, **Exhibit C.**)

12 **b. Diann Parker.**

13 After the Detectives cleared the scene and returned to the LVMPD homicide office,
14 Det. Thowsen received a phone call from a crime scene analyst informing him that a Diann
15 Parker ("Parker") had arrived at the crime scene and reported that she had previously been
16 assaulted by Bailey. (Ex. C at 13.)

17 Detectives Thowsen and LaRochelle travelled to Parker's apartment that she shared
18 with her boyfriend, Steven King ("King"), that was located one block north of the homicide
19 scene. Parker and King informed the Detectives that Bailey had sexually assaulted her the
20 prior week and that a sexual assault detective had interviewed her. The Detectives obtained
21 consent to examine Parker and King's clothing and footwear. No evidence was found
22 connecting either Parker or King to the homicide. (*Id.* at 13-14.)

23 On July 17, 2001, the Detectives received Parker's report regarding the rape that
24 occurred on July 5. Listed in the report were the apartment numbers of several "Mexican
25 men" who Parker claimed warned Bailey to stay away from her. On July 18, 2001, the two
26 detectives returned to the apartment and obtained the names of the "Mexican men" from the
27 apartment manager. Det. Thowsen ran background checks on the men and interviewed the

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1 apartment manager. He found nothing connecting the individuals to the murder and
2 dismissed them as suspects. (Ex. A at XIII:136-137, 160.)

3 On July 23, 2001 (after Lobato's arrest), the Detectives returned to Parker's
4 apartment to obtain a taped statement. (Parker's Stmt. **Exhibit D**; and Audio Recordings
5 of Statements CD, **Exhibit E**.) By this date, LVMPD had identified Bailey as the victim,
6 and the Detectives showed Parker a photograph of Bailey, and she identified him as her
7 rapist. (Ex. D.)

8 **c. Laura Johnson.**

9 On July 20, 2001, almost two weeks post-murder, Det. Thowsen received a
10 telephone call from Laura Johnson ("Johnson"), a Juvenile Probation Officer in Lincoln
11 County, Nevada. (Ex. C at 15.) Johnson told Det. Thowsen that a friend of hers, Dixie
12 Tienken ("Tienken"), a school teacher in Lincoln County, had reported to her that one of her
13 former students, Lobato, had cut off the penis of a man who tried to rape her. [Importantly,
14 LVMPD had kept the fact that Bailey's penis had been severed from his body confidential
15 from the public.] Johnson reported that Lobato was concerned that someone may have seen
16 her car and was hiding it at her parent's house in Panaca, Nevada located in Lincoln County.
17 (*Id.*)

18 Det. Thowsen ran Lobato's name in SCOPE and learned that she was 18 years old
19 and a prior sexual assault victim in 1989. (*Id.*) He obtained a copy of her sexual assault
20 report and made arrangements with Det. LaRochelle to travel to Panaca, Nevada – a 170-
21 mile drive. The Detectives met with Johnson later that day and obtained a statement.
22 (Johnson Stmt., **Exhibit F**.) Johnson warned the Detectives not to contact Tienken prior to
23 meeting with Lobato because she would likely warn Lobato about the officers. (Ex. C at
24 16.) The Detectives contacted the Lincoln County Sheriff's Office and requested assistance
25 in locating the Lobato residence. (*Id.*)

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1 **d. Blaise Lobato.**

2 On July 20, 2001, the Detectives traveled to Lobato's residence in Panaca. Det.
3 Thowsen noticed Lobato's red Pontiac Fiero with the distinctive license plate "4NIK8ER"
4 parked in the street. Lobato was home with her sister. Det. Thowsen introduced himself
5 and identified himself and Det. LaRochelle as LVMPD homicide investigators. (Ex. C at
6 16.)

7 Det. Thowsen began by telling Lobato that he understood she had been attacked in
8 Las Vegas and defended herself. (*Id.*) He also told her that her vehicle's license plate "is
9 very distinct." (*Id.*) Lobato responded that someone could have been borrowing her car at
10 the time of the incident. When Det. Thowsen informed Lobato that he knew she had been
11 hurt in the past, Lobato dropped her head, began to cry, and said "I didn't think anyone
12 would miss him." (*Id.*) Lobato agreed to speak to the Detectives and signed a Miranda
13 card. (Lobato Miranda Card, **Exhibit G**; Lobato Depo. at 133-134, **Exhibit H**.)

14 Lobato agrees that she understood her Miranda rights and voluntarily spoke with the
15 Detectives. (Ex. H at 133-134.) Before the Detectives began recording to the conversation,
16 Lobato told them what had happened. (*Id.* at 135-136.) Once the Detectives began
17 recording, Lobato told them the same story, but with more details. (*Id.*)

18 Lobato told the Detectives she had been on a three-day drug binge and had just
19 parked her car in a parking lot she believed was at a Budget Suites near Flamingo and
20 Boulder Highway. (Lobato Stmt. at 20, **Exhibit I**.) She admitted she could be mistaken
21 about the location because "I don't remember a lot." (*Id.* at 5.) As she exited her car, an
22 older black male who smelled "like old alcohol and dirty diapers" threw her down and
23 attempted to rape her. She described her assailant as "really big . . . like a giant compared to
24 me." Lobato said she was wearing a short skirt with pockets, and she retrieved a butterfly
25 knife from the rear pocket and grabbed the assailant's penis and testicles with her left hand,
26 and she remembers "trying to cut it off but I don't know if I actually did" with her right
27 hand. She claimed she then "snapped" and could not recall anything else. She did recall

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1 that the assailant “was on the ground” and “crying.” (*Id.* at 4-5.) She then left because “I
2 didn’t think anybody would miss somebody like that.” (*Id.* at 8.)

3 When pressed about the location of the incident, Lobato admitted there was a
4 dumpster “not far from where it happened but I don’t remember putting him in it or anything.
5 I don’t think there’s anyway that I could have.” (*Id.* at 16.) Also, when asked if she hit the
6 assailant with anything besides the knife, Lobato responded “No, but it’s possible - I have a
7 baseball bat that I keep behind my seat or had a baseball bat.” (*Id.* at 21.) Lobato also
8 denied telling anyone about the incident. (*Id.* at 17.)

9 Lobato eventually threw away her clothes and got rid of the knife. (*Id.* at 9.) She
10 claimed that she hid her car at an ex-boyfriend’s house, Jeremy Davis (“Davis”), and left
11 him a note that “I had done something bad and I had to be gone for a while.” (*Id.* at 8-9.)
12 Lobato also reported going to a Catholic church in the early morning hours where she used a
13 phone. (*Id.* at 10.) She told the Detectives she returned a week later to pick up her car and
14 found it damaged and that someone had urinated and defecated in it. She then returned to
15 Panaca on July 13th and visited a doctor and was prescribed Prozac due for her depression
16 from the incident. (*Id.* at 15.) At the very end of her statement, Lobato claimed to recall
17 another person assaulted by Bailey named “Mumblina,” and she mentioned her attack
18 occurred “over a month ago.” (*Id.* at 27.)

19 After obtaining Lobato’s statement, Det. Thowsen placed Lobato under arrest for
20 Murder with a Deadly Weapon. (Ex. C at 17.) Lobato signed a consent to search card
21 allowing the Detectives to search her via DNA buccal swab, her bedroom, and her vehicle.
22 The Detectives took photographs of Lobato, collected a pair of black shoes, and
23 photographed her vehicle. Det. Thowsen also showed Lobato a photo of Bailey. The photo
24 caused Lobato to tear up, but she said she could not recognize him because she had put him
25 out of her mind. (*Id.*)

26 As they were finishing up, Lobato’s step-mother, Rebecca Lobato (“Rebecca”),
27 returned home. She denied any knowledge of the homicide. (Ex. C at 17.) However,

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Las Vegas, Nevada 89145
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1 Lobato told Rebecca, “Mom, I did it, now I have to do what I have to do.” A short time
 2 later, Lobato’s father, Larry Lobato (“Larry”), also arrived home. The Detectives explained
 3 Lobato was under arrest for homicide. Larry kissed his daughter good bye, and she said
 4 “I’m sorry, Daddy, told you I did something awful.” When asked by Det. Thowsen, Larry
 5 denied any knowledge of the homicide. (*Id.* at 17-18.)

6 Lobato was transported to the Clark County Detention Center (“CCDC”). At CCDC,
 7 Lobato was photographed for overall appearance and for injuries to her abdomen and right
 8 leg which she suffered rock climbing. She was photographed in cell Z-4. Lobato made the
 9 unprovoked statement that the cell enclosure reminded her of the location where she had
 10 been attacked and that the area where the attack occurred did not have a covering and she
 11 could see the metal covering of a carport area. Det. Thowsen agreed that the cell closely
 12 resembled the garbage enclosure where the incident occurred. (*Id.* at 18.)

13 **e. Dixie Tienken.**

14 On July 26, 2001, Det. Thowsen telephoned Dixie Tienken in Panaca and set up an
 15 appointment. (Ex. C at 21.) The Detectives met with Tienken at her residence and Tienken
 16 provided a voluntary statement. (Tienken Stmt., **Exhibit J**.) Tienken relayed that she was
 17 a former teacher of Lobato and that Lobato arrived at her home in the early morning hours
 18 of July 10th or 11th. *Id.* at 2-3. Tienken immediately noticed that Lobato was driving her
 19 dad’s truck and not her red Pontiac. (*Id.* at 4 & 12.) Lobato told her that she did not want
 20 anyone to see her car because they might recognize it from the incident. Tienken told the
 21 Detectives that Lobato was known to carry and use knives. (*Id.* at 8.)

22 Lobato told Tienken “I did something bad and I need a hug.” (*Id.* at 4.) She then
 23 told Tienken that an “old and smelly” man tried to hit on her. (*Id.* at 6.) Lobato specifically
 24 told Tienken that she cut the man’s penis off and “threw it” and that “it was a mess” and got
 25 “ick on her.” (*Id.* at 5, 9.) Importantly, Lobato told Tienken that the assault occurred on one
 26 of the “hotel streets” and that it was either West Flamingo or West Tropicana and that it
 27 occurred “between buildings or in an alley.” (*Id.*) (Bailey was murdered on West

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1 Flamingo.) Lobato stated that no one saw her but was afraid someone saw her distinctive
2 her car. It was Tienken's impression the man was "stumbling and getting up" when Lobato
3 left. (*Id.* at 10.) Tienken was clear that Lobato "did not think she ever killed anybody." (*Id.*
4 at 20.) According to Tienken, Lobato left the scene, cleaned up at a friend's house, and then
5 drove home to Panaca the same night. (*Id.* at 11.) It was Tienken's impression that the
6 incident Lobato was talking about "had just happened a day or two before" she visited her.
7 (*Id.* at 12.)

8 Tienken also knew about Lobato's former boyfriend, Davis, allegedly damaging her
9 car. However, Tienken told the Detectives that it was a separate incident that occurred
10 previously. (*Id.* at 21-22.)

11 After talking to Lobato, Tienken began checking newspapers on the internet to see if
12 she could find out whether the incident had been reported. (*Id.* at 19-21.) She also
13 acknowledged that, on July 11th, she had relayed Lobato's story to probation officer
14 Johnson. (*Id.* at 22-23.)

15 **f. Stephen Pyszkowski.**

16 On July 23, 2001, the Detectives met with Lobato's former roommate, Stephen
17 Pyszkowski ("Pyszkowski"). (Pyszkowski Stmt., **Exhibit K.**) In June and July 2001,
18 Lobato moved in with Pyszkowski and had a sexual relationship with both Pyszkowski and
19 his girlfriend. (*Id.* at 8-9.) Pyszkowski also employed Lobato's ex-boyfriend, Davis. (*Id.* at
20 3.) He told the Detectives that he helped Lobato recover her car from Davis's residence in
21 early June 2001. (*Id.* at 4.) He confirmed that Lobato regularly kept a knife in her
22 possession. (*Id.* at 13.) He last saw Lobato the week of July 4, 2001, when she moved out.
23 (*Id.* at 15.) Lobato did tell him around the end of May 2001 that she was worried about a
24 black male "trying to pimp her out or something like that at the Budget Suites." (*Id.* at 12.)
25 She never told him about an attack or severing a man's penis.
26
27

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1 **g. Catherine Anne Reininger.**

2 On August 2, 2001, Catherine Reininger ("Reininger") was interviewed at the Clark
3 County Detention Center by the Detectives. (Reininger Stmt., **Exhibit L.**) Reininger was
4 Pyszkowski's girlfriend. She admitted that both Pyszkowski and she herself had a sexual
5 relationship with Lobato and that the three all lived together. (*Id.* at 5.) It was Reininger's
6 impression that Lobato had a lot of anger toward older men. She last saw Lobato the last of
7 June/early July and believed that she returned to Panaca for the 4th of July. According to
8 Reininger, Lobato told her in May that she "beat someone up and chopped his dick off."
9 (*Id.* at 17.) Reininger said the guy had tried to attack Lobato's sister. She admitted she
10 never told Pyszkowski about this story. (The day prior to the interview she admitted to
11 meeting with Pyszkowski who had already been interviewed by the Detectives.)

12 **h. Doug Twining.**

13 On August 2, 2001, the Detectives met with Doug Twining ("Twining"). (Twining
14 Stmt., **Exhibit M.**) Twining was Lobato's boyfriend at the time, and he admitted that he
15 had spoken to Lobato's father, Larry, earlier in the day.

16 According to Twining, he met Lobato the end of May 2001. (*Id.* at 2.) The two
17 developed a relationship, and she stayed with him June 30th until July 2nd. (*Id.* at 3,7.)
18 Twining claimed that Lobato was continuously in Panaca from July 2nd through July 8th.
19 (*Id.* at 7-8.) On July 9th, he drove to Panaca and picked Lobato up at 12:45 a.m. and left to
20 return her to Las Vegas at 1:10 a.m. (*Id.* at 8-9.) Twining claimed that around the end of
21 May or first part of June, Lobato said she "cut a guy's penis." (*Id.* at 12.) He did not
22 believe she was serious. Twining admitted to being in love with Lobato and that he
23 threatened suicide when she told him she wanted to go back to Panaca on July 2nd.

24 After Twining picked Lobato up on July 9th, she stayed with him until July 13th,
25 when Lobato's father came to pick her up. (*Id.* at 10.) From July 9th through July 13th,
26 Twining admitted he and Lobato "tried to lay, law low because, you know, she didn't want
27 to deal with [Pyszkowski and Reininger's] bullshit." (*Id.*) He admitted they did not leave

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1 his place except to get food. Twining also admitted they watched news stories on the Bailey
2 homicide. (*Id.* at 11.)

3 **i. Jeremy Davis.**

4 On July 25, 2001, the Detectives interviewed Lobato's ex-boyfriend Davis. (Davis
5 Stmt., **Exhibit N.**) Lobato and Davis dated for five years, but the last time he saw her was
6 May 15, 2001. (*Id.* at 2-3.) On May 25, 2001, Lobato's car appeared in his driveway with a
7 note that she needed to leave town. Davis left town, and, when he returned on May 28th, the
8 vehicle was gone. (*Id.* at 5.) He told the Detectives that Lobato was "into knives." (*Id.* at
9 9.) Davis denied ever seeing Lobato's car after the date of the Bailey homicide. The
10 Detectives also interviewed Davis's then-girlfriend, Kimberly Miller, who confirmed his
11 story. (Ex. C)

12 **j. Korinda Martin.**

13 On August 1, 2001, the Detectives interviewed CCDC inmate Korinda Martin
14 ("Martin") at the request of the district attorney. (Martin Stmt., **Exhibit O.**) Martin
15 claimed that Lobato confessed to her and said she met Bailey while looking for
16 methamphetamine. The victim wanted a "piece of ass" so Lobato hit him in the head, later
17 cut off his penis and tried to shove it down his throat. (*Id.* at 4-8.) Lobato also said she
18 stabbed him in the anus and lost count at 8 stabs. Martin claimed that Brenda Self also
19 overheard the confession. (*Id.* at 3.)

20 **k. Lobato's alibi witnesses.**

21 Lobato provided the Detectives with a list of witnesses who she claimed she told
22 about the incident. The Detectives, with the assistance of the Lincoln County Sheriff's
23 Office, located and interviewed the witnesses. The Detectives were able to locate and
24 interview each witness identified except "Shane Craft." (Ex. C at 22.)

25 **(1) Michele Austria.**

26 Michele Austria ("Austria") was a friend of Lobato. (Austria Stmt., **Exhibit P.**)
27 She recalled that at some point during the week of July 2nd - 8th, Lobato told her she was

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1 attacked in Las Vegas and pulled a knife from her bag and slashed the person's penis. (*Id.* at
 2 3.) Lobato did not tell her where the incident occurred, nor did she describe the man. (*Id.* at
 3 7.) Austria knew that Lobato used a butterfly knife but did not know if the man was dead or
 4 alive but that Lobato "pretty much figured that she had killed him." (*Id.* at 8.) It was
 5 Austria's assumption that the incident occurred "within the first couple of weeks or sometime
 6 before" Lobato returned to Panaca in July, but Lobato never told her when it occurred. (*Id.*
 7 at 9.) Lobato told her that, as result of the incident, she required medical treatment and
 8 began taking medication for depression. (*Id.* at 3, 7-8.) Austria found Lobato to be "very
 9 upset," "very different," and "wasn't happy at all." (*Id.*)

10 (2) **Paul "Rusty" Brown.**

11 Paul Rusty Brown ("Brown") was Austria's boyfriend. (Brown Stmt., **Exhibit Q** at
 12 2.) According to Brown, he was present for Lobato and Austria's conversation. Brown
 13 recalled the conversation occurring just one week before Lobato's arrest on July 20, 2001.
 14 (*Id.*) He overheard Lobato tell Austria that a man was molesting her, and she grabbed a
 15 knife and cut his penis off. (*Id.* at 3.)

16 (3) **Heather McBride.**

17 Heather McBride ("McBride") had known Lobato since high school. (McBride
 18 Stmt., **Exhibit R** at 2.) Sometime after the July 4th weekend, Heather was at home with
 19 her boyfriend, Chris Collier, when Lobato came for a visit. (*Id.* at 3.) Lobato arrived in "her
 20 dad's truck." (*Id.* at 9.) During the visit, Lobato told her that she used a butterfly knife to
 21 stab a man in the abdomen who "did her wrong." (*Id.* at 4.) Lobato left without knowing
 22 whether her attacker was dead or alive. (*Id.*) Lobato did not tell her when or where the
 23 incident occurred. (*Id.* at 4-5.) McBride described Lobato's demeanor as "down" and "very
 24 not normal." (*Id.* at 9.) Lobato also told McBride that in Las Vegas people hired her to go
 25 out and beat up people who had done them wrong on a drug deal. (*Id.* at 5.)

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Christopher Collier ("Collier") is McBride's boyfriend who was present during Lobato's visit. (Collier Stmt., **Exhibit S.**) Collier recalled the visit occurring between July 9th and 11th. (*Id.* at 2.) He claimed to be certain of the date because it occurred between a softball tournament and his brother's birthday. (*Id.* at 3.) Lobato arrived in her dad's truck. She told a story of how she stabbed a large, black male and left him not knowing the outcome. (*Id.* at 4.) Lobato stated the incident happened in Las Vegas and that she was "tweakin" on methamphetamine. (*Id.* at 5.) One month prior to the visit, Lobato had told him she had been paid to "beat the shit out of people in Las Vegas," and he knew she carried a butterfly knife. (*Id.* at 6.)

(5) Christopher Carrington.

Christopher Carrington ("Carrington") used to date Lobato and had recently moved back to Lincoln County. (Carrington Stmt., **Exhibit T.**) On July 27, 2001, Carrington told the Detectives that, a week earlier, he ran into Lobato in front of drug store. Lobato told him she returned to Panaca because her "bodyguard" pulled a gun on her. She did not say anything about an attack. Carrington had seen Lobato with a knife in the past. (*Id.*)

2. Det. Thowsen's additional investigation.

At the time of the homicide, NRS 629.031 required that healthcare providers report any injuries involving the use of a knife or firearm. Det. Thowsen, with the assistance of his staff, researched all police records (from all local police agencies) and contacted local hospitals and healthcare providers to determine whether anyone had reported any stab injuries to the groin area. (Ex. A at XIII:59-63, 112-116.) The Detectives did not locate any such injuries for the months of May, June, or July 2001 and reported their findings to the District Attorney's office. (*Id.*) [Det. Thowsen conducted this additional investigation after Lobato was arrested and at the request of the district attorney - hence it is not mentioned in the Officer's Report. (*Id.*)]

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1 After Lobato's arrest, Det. Thowsen traveled to the Budget Suites where Lobato
2 claimed she was attacked in May 2001. At the Budget Suites, Det. Thowsen spoke to the
3 manager and learned that it had 24-hour security, that there were no reports of a stabbing
4 having occurred there, and there was no evidence of a crime scene. (*Id.* at 159-164.)

5 **C. PRELIMINARY HEARING.**

6 On August 7, 2001, a preliminary hearing was held. (Preliminary Hearing
7 Transcript, **Exhibit U.**) At the hearing, Dixie Tienken, medical examiner Dr. Simms, and
8 Det. Thowsen testified. (*Id.*) At the conclusion of the testimony, the presiding judge held
9 that "there is sufficient cause to believe that Kirsten Blaise Lobato is responsible for those
10 crimes and you're hereby ordered to be held over to answer to the charges in the Eighth
11 Judicial District Court . . ." (*Id.* at 63-64.) Lobato does not believe that any of the witnesses
12 lied or provided false information at the preliminary hearing. (Ex. H at 172:18-21.)

13 **D. LOBATO'S 2002 CRIMINAL TRIAL.**

14 Lobato's first criminal trial occurred in May 2002. (2002 Criminal Jury Trial
15 Transcript, **Exhibit V.**²) At the trial, the State argued that Lobato murdered Bailey. Lobato
16 denied committing the murder, set forth a theory that she had injured another man in May
17 2001 at a Budget Suites, and argued that the State was conflating the two events.

18 **1. The State's case-in-chief.**

19 The first witness called by the State was Bailey's cousin, Lueron Williams
20 ("Williams"). (Ex. V at I:43.) She testified that Bailey had an account at the bank near
21 where his body was found. (*Id.* at I:43-48.) Following Ms. Williams, witness Shott testified
22 to finding Bailey's body while "dumpster diving." (*Id.* at I:49-50.) He also testified that the
23 police investigated him as a suspect and what actions they took. (*Id.* at I:58-59.) The next
24 witness was Palms Hotel & Casino security manger Iain Anderson to discuss the dumpster
25

26
27 ² Relevant portions of Lobato's 2002 criminal trial transcript are attached as Exhibit V. This Motion's citations refer to the volume of the transcript and the page. So, a reference to page 1 of volume I of the 2002 criminal trial will be cited as "Ex. V at I:1."

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1 area where the body was located. (*Id.* at I:60-72.) Officer Testa was then called to discuss
2 his efforts as the first arriving officer to preserve the crime scene. (*Id.* at I:76-109.)

3 The State then called Lobato's ex-boyfriend Jeremy Davis. He testified that Lobato
4 would drive back and forth between Las Vegas and Panaca to see him and that, due to a
5 known shortcut, the drive could be made in two hours. (*Id.* at I:124-26.) He testified that,
6 after they broke-up, Lobato left her car in his driveway for about five days during Memorial
7 Day weekend the end of May 2001. (*Id.* at I:127-28.) Davis also testified to Lobato's
8 methamphetamine use and the role it played a role in their break-up. (*Id.* at I:133-34.)
9 Finally, Davis testified that Lobato was known to carry knives. (*Id.* at I:146-48.)

10 Following Davis, the State called Lobato's former-roommate Pyszkowski to the
11 stand. Pyszkowski testified that Lobato lived with him and girlfriend, Reininger, in May
12 2001. (*Id.* at I:153-154.) He also testified that Lobato would drive back and forth to Panaca
13 in 2001. (*Id.* at I:154.) Pyszkowski testified that Lobato worked with him servicing fire
14 extinguishers and that his "territory" included the area where Bailey's body was found. (*Id.*
15 at I:155-56.) On cross-examination, Pyszkowski testified that it was his opinion the police's
16 timeline was off because he "had heard about [Blaise being attacked] months before." (*Id.*
17 at I:157, 171.) Pyszkowski also testified that he helped retrieve Lobato's car from Davis's
18 house in May 2001 because Davis and Lobato "were fighting." (*Id.* at I:161.) On re-direct,
19 Pyszkowski admitted that, during his police interview, he never told the police about a prior
20 attack where Lobato claimed to cut someone's penis off because "I didn't think she had."
21 (*Id.* at I:169-170, 175-176.) Eventually, Pyszkowski admitted that he actually heard about
22 the prior attack from his girlfriend, Reininger, and not from Lobato, herself. (*Id.* at I-177.)
23 So, in short, with respect to the prior attack, Pyszkowski testified to an alibi he had no
24 personal knowledge of and, in the end, conceded that he only heard about the alibi second
25 hand despite being Lobato's roommate and lover just after the attack. Finally, Pyszkowski
26 confirmed that Lobato used methamphetamine and carried a switchblade knife. (*Id.* at
27 I:178-80.)

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(702) 382-0711 FAX: (702) 382-5816

1 The second day of testimony began with Dr. Simms, the Chief Medical Examiner of
 2 Clark County who performed the Bailey autopsy. (*Id.* at II:27.) Dr. Simms testified that
 3 Bailey suffered a number of blunt force injuries all over his head and face, a number of stab
 4 wounds to the neck and face, defensive wounds on the hands, a stab wound to the abdomen,
 5 and post-mortem sexual mutilation including a severed penis and a large slash to the rectum.
 6 (*Id.* at II:32-36.) Bailey also had a skull fracture and six missing front teeth most likely
 7 caused by blunt force trauma that could be consistent with someone using the large end of a
 8 bat. (*Id.* at II:36-38.) Finally, Dr. Simms stated his opinion with a “high degree of
 9 confidence” that the victim had been dead between 8 and 24 hours when his body was
 10 discovered and “more likely than not” had been dead “between 10 and 18 hours.” (*Id.* at
 11 II:54-57.)

12 Dixie Tienken took the stand after Dr. Simms. Tienken testified that she had been
 13 Lobato’s teacher in Panaca and that Lobato confided in her “many times.” (*Id.* at II:954-96.)
 14 According to Tienken, Lobato showed up at her house early in the morning (*id.* at II:97) on a
 15 Wednesday in July 2001³ (*id.* at II:98) and said, “I need to talk to you, I did something bad.”
 16 (*Id.* at II:96.) Because Tienken had just gotten out of bed, Lobato waited outside for a few
 17 hours. (*Id.*) When the two finally talked, Lobato told her that she was approached by a
 18 “smelly” man who had “his penis out.” (*Id.* at II:100-101.) The man “propositioned” or
 19 “asked for money” and then knocked Lobato down and “tried to rape her.” (*Id.* at II:101-
 20 102.)

21 Lobato left Tienken with the impression that the “bad” thing she had done “had
 22 happened shortly before” she came to her house and that she indicated to the police it was
 23 her belief the “bad” event occurred just “a couple of days” earlier. (*Id.* at II-100.) Lobato
 24 told Tienken that the man “was trying to put his penis in her mouth” and so “[s]he got her
 25 knife out ... grabbed his penis and she said that she cut it off” and gestured that she just

26 _____
 27 ³ Tienken testified she did not recall the exact date Lobato visited, but she did know that she talked
 to Laura Johnson “that [same] day.” *Id.* at II-98. Johnson testified she talked to Tienken on July 18,
 2001. *Id.* at II-127.

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Las Vegas, Nevada 89145
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1 threw it. (*Id.* at II:103-104.) Lobato then said she “ran towards her car” and looked back
2 and saw the man “grabbing” and “holding” himself. (*Id.* at II:104.) Tienken acknowledged
3 that she told the police Lobato had indicated the incident occurred “off of like a hotel
4 [named] street” and it “could have been “[Desert Inn], Flamingo, Tropicana . . .” (*Id.* at
5 II:110-111.) Tienken testified that Lobato told her she wanted to get the “ick” off of her so
6 she went to an unknown friend’s house to clean up and then went home to Panaca. (*Id.* at
7 II:104.) Lobato told Tienken she was concerned someone might have seen her distinctive
8 red car. (*Id.* at II:105.) Tienken noted that Lobato was driving her father’s pick up and
9 concluded that Lobato “was still a little bit afraid that someone might” recognize her car.
10 (*Id.* at II:106-107.) Tienken was clear that the time that Lobato left her car at her former-
11 boyfriend Davis’ house on Memorial Day weekend had nothing to do with her attack. (*Id.* at
12 II:105-106.) After talking to Lobato, Tienken began searching the internet “to see if anyone
13 had come into a hospital or anybody had complained about having his penis cut off.” (*Id.* at
14 II:99.)

15 Tienken was followed by Laura Johnson. (*Id.* at II:127.) According to Johnson,
16 Tienken came to her place of work on July 18, 2001 at 12:30 p.m. (*Id.* at II:128.) Tienken
17 told Johnson that Lobato had been in Las Vegas where “a man tried to attack her with his
18 penis hanging out of his pants and that [Lobato] had cut off his penis.” (*Id.* at II:130.)
19 Johnson was also told that Lobato was “hiding up in Panaca” and that her “parents were
20 hiding [her] vehicle in Panaca and that they were possibly going to have it painted or get rid
21 of it.” (*Id.* at II:131-132.) The next day, Johnson began calling Las Vegas area police
22 departments and was eventually connected to LVMPD’s homicide department and Det.
23 Thowsen. (*Id.* at II:132-133.)

24 Lobato’s friend, Michele Austria, testified next. (*Id.* at II:141-142.) Austria
25 confirmed that Lobato would drive back-and-forth between Las Vegas and Panaca. (*Id.*)
26 During the “weekend after” the Fourth of July, Austria and Lobato went “four wheeling”
27 and hung out. Lobato told Austria “that she had been attacked and that she pulled a knife

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 from her bag.” (*Id.* at II:146.) According to Austria’s testimony, she knew the incident
2 happened in Las Vegas, and Lobato never told her what she did with the knife. (*Id.* at
3 II:148-149.) Austria also testified that Lobato was depressed, “[h]aving a problem dealing
4 with her conscience,” and going to a doctor for anti-depression medication. (*Id.* at II:150.)
5 (This places Austria’s conversation with Lobato sometime after July 16, 2001.⁴) At trial,
6 Austria backed away from her original statement to the Detectives that Lobato had
7 confessed to “slash[ing] [her attacker’s] penis.” (*Id.* at II:152.) She did not deny telling the
8 Detectives this, but now testified that her current story “is now my testimony” and that her
9 original statement was “not true.” (*Id.* at II:152-153.) Under cross-examination, Lobato’s
10 attorneys suggested that conversation with Lobato occurred on July 1st, 7th, or 8th, and
11 Austria agreed. (*Id.* at II:157-158.) She also admitted to talking to Lobato’s parents the day
12 after Lobato’s arrest. (*Id.*)

13 The State called Paul Brown, Austria’s boyfriend, as its next witness. Brown
14 testified to hearing the conversation between Lobato and Austria. (*Id.* at II:166-167.)
15 Lobato told Austria that “she was attacked or – by a man and she used – she defended
16 herself with a knife and . . . [s]he reached down and . . . cut off his penis.” (*Id.* at 167.)
17 Brown confirmed that this conversation “definitely” occurred “[a]bout a week” before
18 Lobato’s arrest on July 20, 2001. (*Id.* at II:169-170.)

19 On the third day of witness testimony, the State opened with Det. Thowsen. (*Id.* at
20 III:5.) Before testifying before the jury, Det. Thowsen was questioned in front of the Court
21 regarding Lobato’s voluntary statement. (*Id.* at III:6-20.) The Court, after hearing
22 argument, ruled that Lobato’s *Miranda* rights were not violated and that her voluntary
23 statement was admissible. (*Id.*) In front of the jury, Det. Thowsen began by explaining the
24 homicide investigation process and the actual crime scene. (*Id.* at III:21-25.) He explained

25 _____
26 ⁴ According to Lobato’s medical records, she first saw her doctor on July 5, 2001 believing she was
27 being poisoned. On July 5, there is no mention of depression. On July 13, 2001, her mother called
and now reported “restlessness and anxiety.” On July 16, 2001, Lobato returned but now
complained of “depression” and “anxiety.” Lobato, for the first time, was prescribed anti-depression
medication. (Lobato’s Medical Records introduced at trial, **Exhibit W.**)

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 his contact with Diane Allen, her alleged sexual assault by Bailey, and his investigation into
2 her (and her roommate's) potential involvement in the homicide. (*Id.* at III:36-39.) He then
3 explained how he learned from Johnson about Lobato and her potential involvement in the
4 crime. (*Id.* at III:39-42.) Det. Thowsen explained why he does not immediately begin
5 recording the conversation when he talks to a witness and/or suspect and why it is important
6 to develop a rapport with the person before taping the statement. (*Id.* at III:42-43.)

7 Det. Thowsen testified that after interviewing Johnson, he traveled to Lobato's house
8 with Det. LaRochelle and a sergeant from the Lincoln County Sheriff's Office. (*Id.* at
9 III:45.) Upon meeting Lobato, Det. Thowsen told her that "we understood that she had been
10 attacked in Las Vegas and had to defend herself," that her car had a "very distinctive license
11 plate," and that he knew that "she'd been hurt in the past." (*Id.* at III:46.) In response, and
12 prior to telling Lobato they were investigating a homicide, Lobato "dropped her head and
13 started to cry" and said "I didn't think anybody would miss him." (*Id.*) Lobato then
14 voluntarily agreed to speak with the Detectives and waived her *Miranda* rights. (*Id.* at
15 III:47-49.)

16 After Lobato signed her *Miranda* card, she spoke with the Detectives for about
17 twelve minutes before they began recording. (*Id.* at III:58.) Once the recording began, Det.
18 Thowsen asked "pretty much the same questions as [they] did before [the recording]." (*Id.*
19 at III:59.) The State then played Lobato's recorded statement. (*Id.* at III:60; Ex. E.) On re-
20 direct by the State, Det. Thowsen testified that Lobato specifically said she might be
21 confused about the location of the crime in her voluntary statement. (*Id.* at III:116.) Det.
22 Thowsen testified that drug users can confuse two stories into one. (*Id.*) He also pointed out
23 that Lobato told him that she did not recall hitting her attacker with anything but did say
24 "but it's poss---I have a baseball bat that I keep behind my seat or had a baseball bat." (*Id.*
25 at III:117.) Also, Det. Thowsen testified that Lobato admitted there was a dumpster "not far
26 from where it happened" and, more importantly, she volunteered that she did not think she
27 was capable of putting the attacker in the actual dumpster. (*Id.* at III:121.) Det. Thowsen

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 testified that Lobato told him her attacker “was a black man, older” who “smelled like dirty
2 diapers and old alcohol.” (*Id.* at III:123.) After being present at the crime scene and
3 viewing Bailey, Det. Thowsen said that description “was very accurate” of Bailey. (*Id.* at
4 III:123-124.)

5 After Lobato was arrested, Det. Thowsen testified that her step-mother arrived home.
6 Lobato, while crying and still upset, told her stepmom, “Mom, I did it. Now, I have to what
7 I have to do.” (*Id.* at III:61.) In addition, her father also arrived home. After the Detectives
8 allowed the father to kiss Lobato good bye, Lobato said: “I’m sorry daddy; told you I did
9 something awful.” (*Id.* at III:66.)

10 After the arrest, the Detectives transported Lobato to CCDC. During the drive from
11 Panaca to CCDC, Lobato told the Detectives that the knife she used “was actually given to
12 her by her father as a Christmas present.” (*Id.* at III:70.) At CCDC, Lobato was taken to a
13 side cell that “has a painted cement floor, cement walls and a cement or hard ceiling and it’s
14 about, approximately, ten-foot by ten-foot.” (*Id.* at III:74.) Det. Thowsen said that the cell
15 resembled the dumpster area where the Bailey homicide occurred, and Lobato commented
16 that “the room looked similar to the area she was in during the attack; however, it seemed a
17 little bit smaller in that when she looked up, she could see the awning of the parking
18 structure.” (*Id.* at III:75.)

19 Det. Thowsen was also questioned about information that Lobato provided him that
20 was inconsistent with the Bailey homicide and how it was his opinion that Lobato was
21 “minimizing” her involvement or unclear due to her drug use. (*Id.* at III:75-80.) In addition
22 to interviewing numerous witnesses, Det. Thowsen testified that he also investigated
23 whether anyone had reported a penis injury to a medical provider because NRS 629.041
24 required the healthcare provider to contact the police. (*Id.* at III:81-82.) He learned of no
25 such reports. (*Id.*)

26 On cross-examination, Det. Thowsen answered questions on: (1) Lobato’s
27 representation the attack happened at a Budget Suites on the east side of Las Vegas “over a

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(702) 382-0711 FAX: (702) 382-5816

1 month [before her interview]”, (2) the fact that some facts told by Lobato did not match the
2 Bailey crime scene, (3) that no physical evidence tied Lobato to the crime scene, (3) that the
3 bat Lobato had in her car was negative for blood, (4) his handling of the crime scene, and
4 (5) follow-up questions he did not ask Lobato after her statement. (*Id.* at III:83-98 & 105-
5 113.) He was also cross-examined on his handling of Diann Parker and the “Mexican
6 people” who knew about Bailey’s sexual assault of Parker. (*Id.* at III:99-101.)

7 Lobato’s friend, Heather McBride, followed Det. Thowsen on the witness stand. (*Id.*
8 at III:129.) McBride testified that on a date between July 1st and July 4th, 2001, Lobato and
9 McBride’s boyfriend, Chris Collier, were at her house. (*Id.* at III:131.) [McBride admitted
10 she told the police the visit occurred *after* July 4th but, by the time of trial, “I had time to go
11 back and think about it.” (*Id.* at III:141.)] Lobato told McBride “[t]hat someone had done
12 her wrong and she had stabbed [them] in the abdomen,” and she did not know if the person
13 died because “she didn’t stick around to find out.” (*Id.* at III:132-133.) McBride did not
14 believe Lobato “[b]ecause she tends to exaggerate.” (*Id.*) McBride had no further contact
15 with Lobato because “I had thought she was on drugs and I didn’t agree with it being around
16 my family.” (*Id.* at III:135-135.)

17 Lobato’s ex-boyfriend from Panaca, Chris Carrington, testified next. (*Id.* at III:145.)
18 He testified that he had seen Lobato on July “3rd and then, again, on the 5th through the
19 8th.” (*Id.*) Carrington agreed that when he spoke to the Detectives, he did not tell the them
20 he had seen Lobato on July 5th, 6th, 7th, or 8th. (*Id.* at III:146.) He also agreed that after
21 his visit with the Detectives, Lobato’s stepmom came to his house to make sure he knew
22 about the importance of the July 8th date. (*Id.* at III:151&166.) It was through this
23 conversation that he concluded he saw Lobato on July 8th. (*Id.*) Carrington testified he
24 provided incorrect information to the Detectives because he “panic[s]” and “get[s] scared”
25 when “people are asking me questions.” (*Id.* at III:161.) Finally, Carrington admitted he
26 came to court “to testify *for* [Lobato].” (*Id.* at III:159) (emphasis added).

27

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1 Korinda Martin, a former cellmate of Lobato at CCDC testified next. Martin
2 testified that Lobato bragged that she severed a man's penis and placed it "down his throat."
3 Lobato was concerned that blood might be found in her car. Martin also testified she
4 contacted the District Attorney's Office (not the Detectives) with her story, but that the
5 Detectives did take her statement. (*Id.* at III:167-187 & IV:21-41.)

6 After Martin, the State then called Carrington's grandmother, Diane Allen ("Allen"),
7 to the stand. (*Id.* at IV:41-42.) The grandmother began by calling her grandson "brain
8 dead" and agreed she would characterize him "as a little slow." (*Id.* at IV:44-45.)
9 According to Allen, Lobato's stepmom had approached her "at the supermarket looking for
10 [Carrington] because she wanted to tell him some dates to remember before the attorney or
11 police came to talk to him." (*Id.* at IV:45&50.) Allen told Lobato's stepmother that
12 Carrington would not lie for her, and the stepmom left the store "mad." (*Id.* at IV:51.)
13 Allen testified that Carrington was at Lobato's house on July 5th and 6th, but told her
14 Lobato was arguing with her stepmother, and he did not want to get in the middle of it, so he
15 left. (*Id.* at IV:46-47.) She testified that Carrington probably did not see Lobato on July 7th
16 or 8th, because his grandfather had heatstroke, and they were at the hospital both days. (*Id.*
17 at IV:53-54.) But she acknowledged Carrington was not with her the entire time. (*Id.*)

18 The State next called LVMPD Crime Scene Analyst Louise Renhard ("Renhard").
19 (*Id.* at IV:63.) Renhard testified regarding the processing of the Bailey crime scene. (*Id.* at
20 IV:64-70.) She also testified to the processing of Lobato's vehicle and stated they were
21 directed to look for fingerprints, possible weapons, and bloodstains. (*Id.* at IV:72.) One of
22 the tests they performed was a luminol test that "is considered a presumptive test and it is
23 very, very sensitive and is used for looking for the possibility of blood that isn't seen or has
24 been cleaned up." (*Id.* at IV:73.) Renhard described the car as "an older vehicle and it was
25 kind of dirty . . . but the seat covers . . . were very clean" and possibly laundered. (*Id.* at
26 IV:74-76.) The luminol tests had positive hits for blood on the driver's door panel, the
27 driver's seat, and the driver's seat "hit" showed a pattern consistent with wiping. (*Id.* at

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 IV:76-84.) Renhard also found a baseball bat in the car, but tests on the bat were negative
2 for blood. (*Id.* at IV:76-77.)

3 Thomas Wahl (“Wahl”), an LVMPD DNA specialist, took the stand next. (*Id.* at
4 IV:106.) Wahl testified that Lobato’s DNA was not present from any of the items recovered
5 from the crime scene. (*Id.* at IV:108-114.) He conducted further testing on the areas of
6 Lobato’s vehicle which yielded presumptive positive chemiluminescent (Luminol) results
7 for blood. Wahl utilized phenolphthalein testing, which yielded presumptive positive results
8 for the presence of blood on the front left seat cover and the door panel. Wahl was unable to
9 confirm that the presumptive positive areas were blood; however, he noted that human blood
10 which has been degraded through cleaning solutions would not yield a confirmatory result.
11 (*Id.* at IV:114-127.)

12 LVMPD latent print examiner, Joel Geller (“Geller”), testified after Wahl. Geller
13 testified that none of the latent prints recovered at the crime scene belonged to Lobato, and
14 the two footprints found at the scene did not match Lobato. (*Id.* at IV:140-144.) Also,
15 Lobato’s own finger prints *were not* found in her own car. (*Id.* at IV:146-147.) Geller
16 stated that fingerprints could be destroyed by wiping a surface clean or wearing gloves. (*Id.*
17 at IV:149.) He also agreed that tire tracks near the scene of the crime did not match
18 Lobato’s vehicle. (*Id.* at IV:153.)

19 **2. Lobato’s case-in-chief.**

20 Lobato began her case-in-chief on the fifth day of testimony, May 14, 2002. She
21 began by calling Diann Parker. (Ex. V at V:10.) Parker testified that Bailey raped her on
22 July 1, 2001, inside her apartment. (*Id.* at V:12; 14-17.) According to Parker, Bailey also
23 slapped her face “real hard” in front of several “Mexican” men. (*Id.* at V:13-14.) On July
24 4th or 5th, LVMPD sexual assault officers came to her apartment to investigate the rape.
25 (*Id.* at V:18-22.) Parker also testified that Bailey lived in the dumpster enclosure where he
26 was killed, and the enclosure was about half a block away from her apartment. (*Id.* at V:23.)
27 On July 8, 2001, Parker learned of Bailey’s homicide. (*Id.* at V:27.) Parker acknowledged

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 that she had spoken with Lobato's counsel "[f]our or five times" prior to trial. (*Id.* at V:29.)
2 She stated she did not know the "Mexican" men who saw Bailey slap her very well, and she
3 never told them she had been raped by Bailey. (*Id.* at V:29-30.) She denied any personal
4 involvement in the Bailey homicide and denied knowing anyone involved. (*Id.* at V:42.)

5 Lobato next called her stepmom, Rebecca Lobato, to the stand. (*Id.* at V:74.)
6 Rebecca testified that Lobato had been sexually abused as a child and, therefore, came to
7 live with her at six-years-old. (*Id.* at V:75-76.) In 2001, Lobato was living in Las Vegas but
8 returned to Panaca in her red Pontiac Fiero on July 2, 2001. (*Id.* at V:78.) Rebecca testified
9 that Lobato stayed at their home until July 9, 2001, when she returned to Las Vegas with
10 Doug Twining in his car. (*Id.*) During her stay, Lobato and Rebecca went to the doctor on
11 July 5th because Lobato "was faint and couldn't stand up." (*Id.* at V:80.) Rebecca also
12 testified that Lobato was "depressed" and "up and down" with her emotions. (*Id.* at V:81.)
13 Lobato did not tell her doctor about her depression because she wanted to go into the
14 military and did not want anti-depressants on her permanent record. (*Id.* at V:82-83, 118.)
15 (However, she acknowledged calling in and obtaining the prescription just a week later on
16 July 13. *Id.* at V:140-141.) On July 8th, Rebecca testified she saw Lobato outside their
17 house just after 4:30 p.m. with Carrington. (*Id.* at V:87.) Generally, Rebecca testified that
18 Lobato never left the home on July 8th and that her phone records supported her testimony.
19 (*Id.* at V:83-102.) Lobato's car remained parked in front of their house the entire week. (*Id.*
20 at V:156-157.)

21 On cross-examination, Rebecca admitted that she and Lobato "fought an awful lot."
22 (*Id.* at V:109.) And, the two fought the week of July 2 - July 9 because Lobato wanted to
23 return to Las Vegas. (*Id.* at V:143.) She also admitted that Lobato had a methamphetamine
24 problem and that she had called the police looking for her in May 2001 after she visited the
25 family home and had "taken off." (*Id.* at V:111.) Rebecca admitted she called the local
26 police department on July 6, 2001 at 5:27 p.m. (*Id.* at V:115, 150.) She also admitted to
27 telling Carrington the importance of the July 8th date. (*Id.* at V:124-126.) Rebecca claimed

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 that although she was in regular contact with Lobato's criminal defense attorney, she did
2 learn that the crime Lobato was arrested for occurred on July 8 until July 25 when she read a
3 newspaper article. (*Id.* at V:158-159.)

4 Lobato took the stand on her own behalf on the sixth day of testimony. (Ex. V at
5 VI:4.) She denied killing Bailey and testified that she was in Panaca on the date of the
6 homicide. (*Id.* at VII:5.) She denied ever being at the scene of the crime prior to the
7 homicide. (*Id.* at VI:6.) She admitted that the Detectives told her that they were discussing
8 an event from "a couple of weeks ago" but she never used that term. (*Id.* at VI:8.) At the
9 very end of the interview, she told the Detectives her incident occurred "over a month ago"
10 and that she "was out of my mind on drugs." (*Id.* at VI:10-11.) Lobato now testified that
11 she had no trouble "remembering details about the attack." She testified the incident she
12 described to the Detectives occurred Memorial Day Weekend in an open parking lot at
13 Boulder Suites where she was living and where she was attacked by a large, older black
14 man. (*Id.* at VI:11-15.) After being pushed to the ground, Lobato stated she grabbed her
15 knife and "just reached for whatever I could grab for down there and I cut." (*Id.* at VI:16.)
16 She now denied knowing exactly where she cut the man. (*Id.* at VI:16-17.) She never hit
17 the man with anything, and, when she left, he was alive and "crying." (*Id.* at VI:17.)

18 Lobato admitted that when the Detectives first contacted her, she told them "I didn't
19 think anybody would miss someone like that." (*Id.* at VI:18.) She explained that she made
20 the unsolicited past-tense statement because "I didn't think anybody would miss a rapist."
21 (*Id.*) After escaping, Lobato said she got in her car and went to her ex-boyfriend Jeremy
22 Davis' house. (*Id.* at VI: 19.) She claims she "hid" the car at Davis' house because she
23 "was afraid that this man would come after me." (*Id.*) After changing her clothes in her car,
24 Lobato went "to the church right around the corner" from Davis' house. (*Id.* at VI:21.)
25 Despite it still being early morning, Lobato testified "[t]hey were having some kind of choir
26 practice and the doors were open. (*Id.* at VI:103.) She never asked the "choir people" for
27 help. (*Id.* at VI:106.) She called some unidentified people that she had just met, and they

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 picked her up at the church, and, then she, went to their motel. (*Id.* at VI:21-22; 103-104.)
 2 Later that same week, she and Pyszkowski returned to Davis' house and retrieved her car.
 3 (*Id.* at VI:22.)

4 Lobato also admitted that, after she was arrested, she was placed in holding cell at
 5 CCDC and told Det. Thowsen the room reminded her of the scene where the crime occurred.
 6 (*Id.* at VI:26-27.) She told the jury she was actually referring to a "cave" located at the
 7 Budget Suites. (*Id.* at VI:27; 71-72.) With respect to Tienken, Lobato denied telling her that
 8 she had severed someone's penis. (*Id.* at VI:30-31.) She described Tienken's testimony as a
 9 "misunderstanding" and "mistaken." (*Id.* at VI:56; 65.) Lobato then testified that she talked
 10 about the Memorial Day attack to several people prior to July 8, 2001. She also testified to
 11 several other facts in support of her alibi. (*Id.* at VI:32-41.)

12 On cross-examination, Lobato confirmed she did not commit the homicide and
 13 testified that she agreed with the Detectives that her assault occurred "a couple of weeks
 14 ago" because "I didn't catch the couple of weeks ago part." (*Id.* at VI:54.) Lobato testified
 15 she spoke in past-tense about her attacker because "I assumed" he was dead because the
 16 Detectives were from homicide. (*Id.* at VI:102-103.) Despite the fact that she testified she
 17 acted in self-defense, she agreed that she wanted to hide her car out of concern that
 18 somebody saw her. (*Id.*) She also testified that prior witness testimony claiming that she
 19 confessed to cutting someone's penis (including her own statement to the Detectives⁵) was
 20 inaccurate because she does not know what she cut. (*Id.* at VI:60-63.) She admitted she did
 21 not remember if she hit her assailant with anything when talking to the Detectives, but now
 22 is confident she did not hit him. (*Id.* at VI:64.)

23 Lobato agreed that the Budget Suites' parking lot was very populated but that she did
 24 not recall screaming and never sought help. (*Id.* at VI:100-101.) She left the scene without
 25 getting help because she did not want the man to know where she lived. (*Id.* at VI:102.)
 26

27 ⁵ She told the Detectives in her Mirandized statement, "I cut his penis. I remember that" and that she was trying to "cut it off." Ex. I.

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Las Vegas, Nevada 89145
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1 She admitted to getting rid of the clothes she was wearing, along with the knife, while
2 driving to Davis' house. (*Id.* at VI:72-73.) She could not explain why her own fingerprints
3 were not found in her car. (*Id.* at VI:77.) In discussing her Panaca doctor visits, Lobato
4 admitted she did not receive any anti-depressant medication on the July 5th visit, but did get
5 an anti-depressant prescription on July 13th. (*Id.* at VI:109.) Lobato said the reason she
6 refused on July 5th was due to her desire to join the military (which apparently ended by
7 July 13th). (*Id.* at VI:109; *see also* Ex. W.)

8 After Lobato testified, Douglas Twining took the stand. (Ex. V at VI:150.) Twining
9 testified that Lobato had lived with him until July 2, 2001, and, then, she returned to Panaca,
10 and he did not see her again until July 9, 2001. (*Id.* at VI:152-153.) However, he knows she
11 was in Panaca on those dates due to phone calls. (*Id.* at VI:152-153.) He, then, testified
12 regarding numerous phone calls made from July 8, 2001-July 9, 2001. He picked Lobato up
13 in Panaca after midnight on July 9, 2001 and took her back to his parents' house in Las
14 Vegas. (*Id.* at VI:161.) Lobato then stayed with him in Las Vegas until July 13th, when her
15 father picked her up. (*Id.* at VI:161-162.) Twining did not testify that Lobato ever told him
16 about the Budget Suites' attack.

17 On cross-examination, Twining estimated he met Lobato the end of April or first of
18 May 2001. (*Id.* at VI:164.) During the months of May and June 2001, Twining testified that
19 he saw Lobato quite frequently and that she lived with Pyszkowski, and he never testified
20 she lived at the Budget Suites. (*Id.* at VI:164, 166.) She eventually moved in with him for
21 ten to fourteen days after their relationship turned romantic. (*Id.*) He acknowledged that
22 after Lobato's arrest, but before he spoke to the Detectives, he had talked to Lobato's
23 parents "[m]aybe a half dozen" times about the importance of dates. (*Id.* at VI:173-174,
24 176.) Twining agreed that when he spoke with the Detectives on August 5, 2001, he told
25 them he picked Lobato up in Panaca on July 9th to return her to Las Vegas so they could
26 "lay low." (*Id.* at VI:178-179.)

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10001 Park Run Drive
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(702) 382-0711 FAX: (702) 382-5816

1 After Twining, Richard Gloeckner took the stand. (*Id.* at VI:198.) He testified that
2 Lobato's stepmom took a sick day from work on July 6, 2001. (*Id.* at VI:198-201.)

3 Lobato's attorney read a report into the record from William J. Bodziak, a forensic
4 consultant who was a specialist in the area of shoe impressions and footwear. The report
5 concluded that footprints found at the Bailey crime scene did not match Lobato. (*Id.* at
6 VII:3-6.) Lobato then called witness Shayne Kraft ("Shayne") – Lobato's step cousin. (*Id.*
7 at VII:7-8.) Shayne testified she saw Lobato July 4, 2001 at a barbeque and July 8, 2021 in
8 the evening between 6:00 p.m. and 8:30 p.m. (*Id.* at VII:8.) She was able to establish the
9 date because she took her husband to the hospital the next day, and he received a
10 prescription. (*Id.* at VII:10-11.) On cross-examination, Shayne admitted that after Lobato's
11 arrest, Lobato's stepmom had discussed important dates with her. (*Id.* at VII:13.) During
12 these conversations, she realized that July 8th was the date she saw Lobato. (*Id.*)

13 Forensic science expert George Schiro ("Schiro") was called next. (*Id.* at VII:14.)
14 He offered testimony regarding the State's blood testing results. In his opinion, the positive
15 results were not indicative of human blood. (*Id.* at VII:21.) And, that if it was actually
16 human blood, there is no way to date the age of the blood. (*Id.* at VII:23.) Schiro testified
17 (in response to none of Lobato's own fingerprints being found in her own car) that
18 individuals do not always leave fingerprints. (*Id.* at VII:62-64.)

19 Lobato's next door neighbor, Jo Ann Dennert ("Dennert"), was the next witness. (*Id.*
20 at VII:69.) She testified to seeing Lobato on July 8, 2001, outside her home at around 1:30
21 p.m. riding a four-wheeler. (*Id.* at VII:72-73; 78.) She recalled the date because it was one
22 of her friend's birthdays. (*Id.* at VII:73-74.) Dennert also acknowledged that, after Lobato's
23 arrest, she talked to Lobato's parents about the importance of the July 8th date.⁶ (*Id.* at
24
25

26 ⁶ Interestingly, Dennert testified that Lobato's stepmother stressed this date the day after Lobato's
27 arrest—i.e., July 21, 2001. *Id.* at VII:77-78. This, despite the fact that the stepmother testified she
did not know the murder occurred on July 8th until July 25, 2001, when she read it in a newspaper
article. *Id.* at V:158-159.

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

VII:76-77.) She never called the police and admitted that the stepmother provided her name only to Lobato's defense attorneys. (*Id.* at VII:82.)

After Dennert, Lobato's defense rested.

3. State's Rebuttal Witnesses.

The first rebuttal witness was Zachory Robinson ("Robinson"), an assistant general manager with the Budget Suites. (Ex. V at VIII:47-48.) He testified to the Budget Suites being a busy 24-hour business. (*Id.* at 47-48&50-52.) He testified the spot where Lobato claimed to have been assaulted was within view of the front office - maybe thirty-five to forty feet away. (*Id.*) Robinson also testified that the hotel had twenty-four-hour security. (*Id.* at VII:51.) After reviewing Budget Suites' records, he found no reports of a man being assaulted with his penis being slashed and that, if there had been, management would have "absolutely" been made aware. (*Id.* at VII:51-53.)

The next rebuttal witness was Jean Page, the officer manager from the Holy Family Church (i.e., the church Lobato claimed to visit immediately after her Memorial Day attack). (*Id.* at VII:59.) She testified that the church's office hours were "8:30 to 4:30." (*Id.* at VII:59.) The church had one phone in the lobby (not the chapel) that was open to the public. (*Id.* at VIII:61.) Finally, the church's two choirs only practice on Tuesdays and Thursdays from 6:30 p.m. to 7:30 p.m. - not a.m. (*Id.* at VIII:62.) Lobato's attorneys asked the witness no questions. (*Id.* at VIII:64.) The final rebuttal witness was Det. Thowsen. (*Id.* at VIII:64.) Det. Thowsen explained his conversation with Lobato where she stated the CCDC holding cell resembled the crime scene. (*Id.* at VIII:67-68.)

Following Det. Thowsen, the parties made closing arguments. (*Id.* at VIII:78-161.)

4. The Verdict.

On May 18, 2002, the jury returned its verdict. The jury found Lobato guilty of first-degree murder with use of deadly weapon and sexual penetration of a human body. (Ex. V at IX:5.)

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 **5. The Appeal of the 2002 Criminal Trial.**

2 Lobato appealed her conviction to the Supreme Court of Nevada. *See Lobato v.*
3 *State*, 96 P.3d 765 (Nev. 2004). In the appeal, Lobato raised thirteen issues. Relevant to
4 this case, Lobato claimed the trial court committed error: (1) in not allowing Lobato to
5 impeach jail house informant Korinda Martin's testimony, (2) by allowing Lobato's pre-
6 mirandized statement to be admitted, and (3) by allowing Det. Thowsen's interview of
7 Lobato to be used against her because Lobato's statement was not voluntary and was the
8 result of psychological coercion.

9 The Nevada Supreme Court held that the trial court erred in not allowing Lobato to
10 impeach jailhouse informant Korinda Martin's testimony and remanded the case for a new
11 trial. Importantly, the Court found that Lobato's claims regarding her police interview were
12 "without merit." *Lobato*, 96 P.3d at 772-73.

13 **E. 2006 CRIMINAL TRIAL.**

14 Lobato's second trial for the murder of Duran Bailey occurred in September of 2006.
15 For this trial, Lobato retained new defense counsel. The same prosecutors handled the
16 prosecution. (Ex. A.)

17 **1. State's case-in-chief.**

18 On the night of July 8, 2001, Shott was dumpster diving in the area of West
19 Flamingo, near a Nevada State Bank, when he saw the stomach of what he believed was a
20 dead body, behind the dumpster. (Ex. A at IV:54-55, 56.) Shott immediately left and went
21 to the Terrible Herbst gas station a block away. (*Id.* at IV:57.) Not knowing what to do,
22 Shott eventually called 911 two hours later, at 10:36 p.m. (*Id.* at IV:58, 63, 64.)

23 Officer Testa, a field training officer with LVMPD, was dispatched to the scene of a
24 sick or injured person at approximately 10:45 p.m. (*Id.* at IV:108-109.) He met with Shott,
25 who showed him where the body was. (*Id.* at IV:110-11.) Testa moved the dumpster, to
26 access the body, and immediately saw several spots of blood, some shoe prints, and a foot
27 sticking out. (*Id.* at IV:116, 117.) Testa noticed blood so he backed away and called for

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1 medical assistance. The fire department confirmed that the person was dead. (*Id.* at IV:118-
2 19.) Testa testified that, although he indicated to the medical team where to step, there was
3 low light, and it was possible that someone could have stepped in areas they shouldn't have.
4 (*Id.* at IV:151.) Testa further testified that there was some saran or plastic wrap around part
5 of the body. (*Id.* at IV:140, 152.) The victim was later identified as Bailey, a homeless man
6 who lived in that area. (*Id.* at IV:67, 75.) Bailey was 5'10" and weighed 133 pounds at time
7 of death. (*Id.* at VIII:42.)

8 Dr. Simms, the forensic pathologist who performed the autopsy on Bailey, testified
9 that the cause of death was likely a combination of the severing of the carotid artery and the
10 blunt force injury to the head. (Ex. A at VII:141.) Based on the injuries, Dr. Simms
11 categorized the homicide as a sexually motivate homicide. (*Id.* at VII:137.) Dr. Simms
12 further testified that he believed a high probability for time of death was between 8 to 24
13 hours before 03:50 a.m. on July 9, 2001. (*Id.* at VII:146.) He was 95% confident that the
14 death occurred within this time frame. (*Id.* at VIII:79.) Dr. Simms stated that he had lower
15 confidence in a time window of 12 to 18 hours, but it was still possible to a reasonable
16 medical certainty. (*Id.* at VII:147; VIII:20.)

17 Bailey suffered bruising at the back of his head, a superficial incised wound on his
18 neck, multiple abrasions, contusions and scratches on his face, as well as a patterned
19 abrasion on his face. (*Id.* at VII:71-72.) Bailey had also suffered a stab wound in the right
20 forehead area, several small incised wounds on the neck, a stab wound on his chin, and a
21 stab wound in the front of the neck. (*Id.* at VII:72.) There were abrasions and four stab
22 wounds on Bailey's side, defense wounds on his hands, a large 6-inch slash in his rectal
23 area, a stab wound to the scrotum, and Bailey's penis had been amputated. (*Id.* at VII:75-76,
24 81.) Dr. Simms testified that the stab wound in the front of the neck, as well as the stab
25 wounds in Bailey's side, the rectal slash, and the penis amputation had been done post-
26 mortem. (*Id.* at VII:84, 86.) The stab wound through the scrotum was made ante-mortem,
27 with an upward thrust. (*Id.* at VII:86, 111.) Dr. Simms testified that the stab wounds were

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1 created by a single-edged knife or weapon. (*Id.* at VII:85.) However, he stated it would be
2 very improbable that the wounds were caused by scissors, and none of the wounds were
3 consistent with a snipping wound. (*Id.* at VII:111, 120-21, 153.)

4 Dr. Simms further testified that the injuries to Bailey's face could be consistent with
5 being struck in the face with a bat, possibly by a female. (*Id.* at VII:132-33, VII:80-81.)
6 Simms also testified that the stab wound to the scrotum could have been the first wound, and
7 Bailey would have been in severe pain. (*Id.* at VII:134, 136.) The blunt force trauma to the
8 back of the head was consistent with Bailey striking his head when falling down, and the
9 accompanying skull fracture would likely have rendered him unconscious. (*Id.* at VII:131.)

10 Thomas Wahl, the DNA analyst, examined the medical examiner's assault report of
11 Bailey, and noted that semen was detected on the penile swabs and rectal swabs, although
12 there were no sperm cells to examine. (*Id.* at V:174-75.) Dr. Simms testified that given the
13 injuries to Bailey's genital and rectal area, it would be possible for semen to transfer from
14 the prostate gland to the injuries. (*Id.* at VII:86-88; VII:107-08.) Bailey was not wearing his
15 pants at the time of the injuries to the genital area, and Dr. Simms testified that the blood
16 pattern on the pants was consistent with Bailey standing or kneeling at the time of the stab
17 wound to the scrotum. (*Id.* at VII:127-28.)

18 On July 18, 2001, Lobato visited Tienken, her former middle school and high school
19 teacher. (Ex. A at V:12.) Lobato visited Tienken in the early hours of Wednesday morning,
20 and told Tienken that she had done something bad, stating, "I really need to talk to you."
21 (*Id.* at V:15-16, VII:11.) Tienken, in the 2002 trial, testified that this occurred on July 18th,
22 but, at the 2006 trial, testified that "[she] realized that that had to have been wrong." (*Id.* at
23 V:16.) In her August 7, 2001 preliminary hearing testimony, Tienken testified that she had
24 talked to Johnson the same day she talked to Lobato. (*Id.* at V:18-19.) Lobato told Tienken,
25 "I did something and I could have hurt somebody but I'm not sure what all I did." (*Id.* at
26 V:22.) Lobato disclosed that a man approached her, scared her, knocked her down and tried
27 to place his penis inside her mouth; in response, she tried to stab up with her knife, then

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1 grabbed the man's penis and "cut it off." (*Id.* at V:22-24, 54.) She, then, threw the severed
2 penis away from her. (*Id.* at V:26-27.) Lobato told Tienken after she cut the penis off, she
3 got "ick" on her, and she got up and ran back to her car. (*Id.* at V:34-35.) Lobato told
4 Tienken the man was alive and groping at his groin as she ran off. (*Id.* at V:72.) This
5 happened either in the early morning or late at night, on a west hotel street, such as West
6 Flamingo or West Desert Inn. (*Id.* at V:28, 29, 56-57.) Tienken, in her voluntary statement
7 to the police on July 26, 2001, told them that Lobato said her attacker was "old and smelly."
8 (*Id.* at V:30.) In the 2002 trial, Tienken only testified to Lobato saying the attacker was
9 "smelly." (*Id.* at V:32.) Tienken, at the second trial, added that Lobato also told her the
10 attacker was "big" and "black," adding new details to the attacker's build that were not in
11 Tienken's voluntary statement or two prior testimonies. (*Id.* at V:29-30, 124-26.) Lobato
12 stated she then went to take a shower at a friend's place in Las Vegas, and then wanted to go
13 home to Panaca. (*Id.* at V:35-36.) Lobato told Tienken that this had happened a few days
14 earlier, while she had been using methamphetamine, stating "I'm don't [sic] with it, I've got
15 to get clean, I want to get off of it." (*Id.* at V:36-37, 45.)

16 Lobato and Tienken searched newspapers and the internet for any mention of a man
17 with a severed penis. (*Id.* at V:37-38, 39.) Tienken testified for the first time that they
18 searched as far back as July 1, 2001; although, in her voluntary statement, Tienken told the
19 police she thought the attack had happened only one or two days before. (*Id.* at V:37-38.)
20 On cross-examination, Tienken further added she researched as far back as June 1, 2001, in
21 response to defense counsel's suggestion that "isn't it true, and I just want to clarify this,
22 that you did research all the way back to June 1st, not July 1st?" (*Id.* at V:82-83.) Tienken
23 later admitted on re-direct examination that she had not mentioned this date range in her
24 voluntary statement, or in either of her two prior sworn testimonies. (*Id.* at V:121, 122-23.)

25 Tienken testified that Lobato was not driving her new car because her ex-fiancé,
26 Davis, had vandalized her car. (*Id.* at V:40-41.) In her voluntary statement, two weeks after
27 Lobato's visit, Tienken made no mention of Davis, but, instead, told police Lobato said "I'm

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1 not driving that car. I don't want anybody to see it," because she was afraid someone may
2 have seen it when she left the site of her attack. (*Id.* at V:40-41.) Lobato told Tienken her
3 father would help get her car cleaned. (*Id.* at V:52.)

4 Tienken related the incident to her friend Laura Johnson, a Lincoln County Juvenile
5 Probation/Parole officer, that same day, on Wednesday, July 18, 2001. (*Id.* at V:47-48;
6 VII:38-39, 49.) Tienken told Johnson that Lobato was hiding out in Panaca with her step-
7 mother and father, who were also hiding Lobato's car and planning on either selling or
8 painting it. (*Id.* at VII:42-43, 59.) Johnson called the LVMPD on Friday, July 20, 2001, to
9 find out whether a man had recently had his penis cut off, and was transferred to Det.
10 Thowsen. (*Id.* at VII:45-46.) Det. Thowsen drove to Panaca to speak with Johnson
11 immediately. (*Id.* XI:203.)

12 Johnson testified that Tienken came to see her on July 18, 2001. (*Id.* at VII:38.)
13 Tienken told her that Lobato was "hiding out in Panaca." (*Id.* at VII:43.) Johnson also
14 testified that prior to the second trial, Tienken called her and tried to give her articles on the
15 case that she had printed out from the internet. (*Id.* at VII:50.) Moreover, Tienken "was
16 absolutely trying to convince [Johnson]" that Tienken had related the description of
17 Lobato's attacker at the time they first spoke of the incident. (*Id.* at VII:51-53, 54.) Johnson
18 testified she did not remember Tienken ever mentioning a description of the attacker. (*Id.* at
19 VII:63.)

20 Michele Austria testified that Lobato claimed she was attacked sometime in the two
21 weeks surrounding July 4, 2001, although Lobato did not give a definite date. (*Id.* at VI:61-
22 63, 66.) Austria testified on cross-examination that she could not give a specific time or
23 dates as to when the conversation about the attack took place. (*Id.* at VI:81-82, 103-04.)
24 She testified she went four-wheeling around Panaca with Lobato during the summer, and
25 that she saw Lobato the weekend of June 30, 2001. She also stated she went four-wheeling
26 with Lobato either on July 7 or 8, 2001, however, Austria did not recall four-wheeling with
27 Lobato in the afternoon of July 8. (*Id.* at VI:86, 87, 108.) Austria further testified that she

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1 went rock-climbing with Lobato during one of these four-wheeling excursions, during which
2 Lobato scratched her stomach. (*Id.* at VI:90, 99-100.) Austria added that she thought she
3 may also have gone four-wheeling with Lobato on the weekend of July 14th and 15th. (*Id.*
4 at VI:91, 101.) Austria knew Lobato was going to the doctor because she was having
5 trouble dealing with her conscience and was depressed because of this incident. (*Id.* at
6 VI:68-69.) Lobato told Austria she was upset because she was not sure whether she had
7 killed the person or not. (*Id.* at VI:70, 85.) Austria admitted she only assumed the attack
8 took place a few weeks before Lobato returned to Panaca. (*Id.* at VI:93, 104.) At the time
9 Lobato disclosed the attack to Austria, Lobato also told Austria she was on medication,
10 including Prozac. (*Id.* at VI:93-95.) [Lobato was not prescribed Prozac before July 16,
11 2001. (*Id.* at XVIII:158.)]

12 Austria's boyfriend, Paul Brown, testified that he overheard Lobato tell Austria that
13 "she'd reached down and cut a man's penis off." (*Id.* at VI:117, 118.) Brown testified he
14 saw Lobato's car in front of her parents' house around the weekend of July 7 and 8, but
15 could not be sure of whether the car was moved during that time period in July. (*Id.* at
16 VI:139.)

17 Christopher Carrington, Lobato's high school boyfriend, testified he told police that
18 the first time he saw Lobato since she returned from Vegas was seven or eight days prior to
19 his statement to police on July 26, 2001. (*Id.* at VIII:91-93.) Carrington testified in the
20 2002 trial that Lobato told him she had driven herself back from Vegas in her red car, but
21 testified, in the 2006 trial that, "that was a mistake in [his] last testifying." (*Id.* at VIII:96-
22 97.) Carrington, in the second trial, testified that he initially saw Lobato on July 3, in
23 Caliente, and at her house on July 5th, July 6th, July 7th, and July 8th after he was done with
24 his yard work around Panaca. (*Id.* at VIII:97-98, 130-31.) He admitted to never having told
25 the police this. (*Id.* at VIII:98, 111-12.) Carrington testified he "vaguely remembered"
26 leaving her house on July 5th, but did not remember telling his grandmother that this was
27 because Lobato and her mother were fighting. (*Id.* at VIII:99-100.) Carrington remembered

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1 seeing Lobato in the afternoon and evening of Sunday, July 8th, when Lobato was packing
 2 for Las Vegas. (*Id.* at VIII:113-14.) Carrington testified he had gone over the dates in a
 3 calendar with his mother after speaking with police, in order to identify the dates he saw
 4 Lobato. (*Id.* at VIII:118.) In the first trial, Carrington testified that the only time he was
 5 positive about the date was after Rebecca Lobato discussed July 8 with him. (*Id.* at
 6 VIII:121; VIII:101-02.) In the second trial, Carrington claimed this was again “a mistake in
 7 [his] last testimony.” (*Id.* at VIII:121.) Carrington also testified that he had once seen
 8 Lobato punch a man and knock him out. (*Id.* at VIII:104-05, 117.)

9 Diane Allen, Carrington’s grandmother, testified that Carrington was a “lame brain”
 10 and “slow.” (*Id.* at VIII:152.) On July 5, Carrington went to Lobato’s house, but returned
 11 early because Lobato and her mother were fighting about Lobato wanting to return to Las
 12 Vegas, and he did not want to be in the middle of it. (*Id.* at VIII:153-54.) Allen testified
 13 that on July 7, her husband had heatstroke around 1:00 p.m., and she and Carrington went to
 14 the hospital in Caliente with him, after Carrington had mowed her grass in the morning. (*Id.*
 15 at VIII:156-57, 170.) Later, sometime after Lobato’s arrest, Allen saw Rebecca Lobato at
 16 the store, at which point, Allen told Lobato that Carrington would not be “giving false
 17 testament for anybody or anything.” (*Id.* at VIII:158-59.)

18 Jeremy Davis, Lobato’s ex-boyfriend, testified in 2002 that when Lobato was on
 19 drugs, she didn’t care about anything. (*Id.* at VI:162.) He testified that getting more drugs
 20 was her number one priority while they were together. (*Id.* at VI:163.) He also testified that
 21 Lobato also supplied the methamphetamine they took together, but although he did not
 22 know where the drugs came from; Lobato told him she had sources. (*Id.* at VI:163-64.)
 23 Davis testified that although the drive from Panaca to Las Vegas was two hours, there was a
 24 shortcut Lobato knew about which would reduce the trip to an hour. (*Id.* at VI:152.) After
 25 their breakup, Lobato left her car in his driveway around May 23rd, before he left town for a
 26 softball tournament on Friday, May 25th. (*Id.* at VI:156.) When Davis returned on Monday
 27 the 28th, Lobato’s car was already gone. (*Id.* at VI:157.)

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1 Stephen Pyszkowski testified he met Lobato through Davis, who worked for him,
2 and Lobato came to live with him and his girlfriend for three or four weeks, starting in June
3 of 2001. (*Id.* at VI:7-8, 41.) Lobato occasionally helped him with his work servicing fire
4 extinguishers. (*Id.* at VI:7-8.) Their work covered an approximate 10-square-mile territory
5 between Charleston and Tropicana; Rainbow on the west and the interstate on the east. (*Id.*
6 at VI:8-9, 26.) Pyszkowski and Lobato took methamphetamine together when she lived
7 with him, as well as with Twining. (*Id.* at VI:17, 22-23.) He also testified that he saw
8 Lobato with a butterfly knife that she would draw it out and flip it open one-handed. (*Id.* at
9 VI:17-18, 31, 38-39.) Pyszkowski testified he had no knowledge of an attack on Lobato at
10 any point in June 2001. (*Id.* at VI:34.) A few days before July 4, 2001, Lobato moved in
11 with Twining. (*Id.* at VI:10, 51-52.) Pyszkowski testified that after Lobato moved out of
12 his house, she stayed with Twining, who then helped her move to Panaca on July 2, 2001.
13 (*Id.* at VI:10, 47, 52.) Pyszkowski testified that Lobato hid her car in a parking lot because
14 she was worried about her car being recognized by Davis, after Lobato and Davis broke up
15 in early June, 2001. (*Id.* at VI:41.) Pyszkowski accompanied Lobato to pick up her car after
16 she had left it in front of Davis' residence, and Pyszkowski testified one of the headlights
17 did not work, and the inside of the car had been trashed, with "garbage and maybe beer."
18 (*Id.* at VI:41, 47.) Pyszkowski stated he was not close enough to notice feces or urine in the
19 car. (*Id.* at VI:47.)

20 Zachory Robinson, the assistant general manager of the Budget Suites, testified that
21 the property included a water fountain with a small tunnel going through the waterfall,
22 which looked like a cave. (*Id.* at XIV:163-64.) He reviewed the daily security records, and,
23 despite there being a security patrol on the property and an office that was open 24-hours a
24 day, there was no mention made of a man with an injured penis, no report of blood on the
25 ground close to the fountain area, and no weapon found on the property. (*Id.* at XIV:167-70,
26 173-75.)

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1 Next, Det. Thowsen testified regarding his investigation. (Ex. A at XI:172-73.)
 2 Initially, Det. Thowsen investigated the possibility that Diann Parker, whom Bailey had
 3 previously sexually assaulted, was involved, but ruled her out as no evidence pointed to her.
 4 (*Id.* at XI:193-94.) Det. Thowsen testified that Bailey's body had clearly been moved from
 5 the corner where it had bled to the location in which it was found. (*Id.* at XI:184.) Det.
 6 Thowsen explained that the police withheld the detail of the severed penis. (*Id.* at XI:198.)
 7 Upon receiving the telephone call from Johnson asking whether LVMPD had a victim who
 8 was killed and whose penis was severed, on July 20, he drove up to Lincoln County with
 9 Det. LaRochelle and crime scene analyst Maria Thomas. (*Id.* at XI:201-203.) Because
 10 Johnson warned him that if he spoke with Tienken first, she might warn Lobato, Det.
 11 Thowsen went to Lobato's house to interview her first. (*Id.* at XI:203, 207-08.) He
 12 introduced himself as a homicide detective and stated that her car and license plate were
 13 distinctive. (*Id.* at XI:212.) Lobato immediately responded that someone could have
 14 borrowed her car. (*Id.* at XI:213.) Det. Thowsen replied that he had heard she had been
 15 attacked a few weeks earlier, without mentioning someone had been murdered. (*Id.* at
 16 XI:213.) Lobato started crying, and said, "I didn't think anybody would miss him." (*Id.* at
 17 XI:213, XIII:8.) Lobato then waived her Miranda rights and said she would speak with the
 18 Detectives. (*Id.* at XIII:9, 11-14.) Det. Thowsen then taped Lobato's statement. (*Id.* at
 19 XIII:22-23.)

20 In her taped statement, Lobato stated that she was attacked by a very smelly man, at
 21 nighttime, "late at night like probably more into early morning," when she was coming back
 22 from going out one night. (Ex. I at 4, 12.) She told the Detectives she was out of her mind
 23 on drugs at the time, and a man, who seemed like a giant to her 5'7" and 101-pound frame,
 24 grabbed her from behind and threw her on the ground. (*Id.* at 3-4, 5.) Lobato stated she
 25 drew out her knife, "everything [went] black from then on," and all she remembered was
 26 throwing out her clothes afterward. (*Id.* at 5.) She stated she remembered cutting his penis,
 27 but didn't remember whether she had hit him with anything, although it was possible she hit

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1 him with the baseball bat she kept in her car. (*Id.* at 6, 21.) Lobato told the Detectives, “I
2 figured nobody would care if I just drove off,” and “I didn’t think anybody would miss
3 somebody like that.” (*Id.* at 8.) Lobato said that although she thought it was at the Budget
4 Suites off Boulder Highway, which had a fountain, it was possible she had the location
5 mixed up, as she didn’t remember much. (*Id.* at 15, 20; Ex. A at XI:102.) Lobato also told
6 police, “well there was a dumpster not far away, it happened - where it happened but I don’t
7 remember putting him in it or anything. I don’t think there’s any way that I could have.”
8 (Ex. I at 16.)

9 After her statement, Det. Thowsen placed Lobato under arrest and drove back down
10 to Las Vegas with her, while her car was towed. (Ex. A at XIII:25-26, 28.) Before leaving
11 the house, Lobato told her mother, “Mom, I did it, now I have to do what I have to do.” (*Id.*
12 at XIII:31.) Lobato also told her father, Larry, “I’m sorry daddy. Told you I did something
13 awful.” (*Id.* at XIII:33.) Rebecca asked permission to give Lobato her Prozac and
14 Lorazepam before Det. Thowsen left with Lobato. (*Id.* at XIII:39.) While Lobato was in
15 jail getting photographed and booked, Lobato volunteered that the room she was in “looked
16 similar to the structured area where the attack had occurred,” and that during the attack, she
17 could look up and see the covered parking in the parking lot from her position. (*Id.* at
18 XIII:50, 53.) Det. Thowsen testified that the crime scene had a parking structure above and
19 behind the dumpster enclosure, and that the dumpster enclosure had similarities with the
20 inside of the jail. (*Id.* at XIII:51-53, 86-87, 141.)

21 Once Lobato was in custody, Det. Thowsen researched whether anyone had been the
22 victim of a slashed or severed penis for the months of May, June and July, and found no
23 information. (*Id.* at XIII:62-63.) Det. Thowsen testified that based on his experience,
24 people often perceive attackers as much larger, and that Lobato’s description at the time
25 matched Bailey’s. (*Id.* at XIII:98-99.) He also testified that, based on his experience,
26 suspects often minimize their acts; meaning that persons giving statements to police
27 regarding their involvement with a crime will often tell the police things they feel the police

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1 already know and then try to minimize their actions by justifying their actions. (*Id.* at
2 XIII:69.) Det. Thowsen further testified that individuals claiming they were on
3 methamphetamine at the time of a crime often jumble things together and put things together
4 with unrelated events - especially if that person was on a multi-day “binge,” during which
5 it’s “not that uncommon for them not to be able to remember certain things and to remember
6 things strangely sometimes.” (*Id.* at XIII:71.) In Det. Thowsen’s opinion, Lobato was
7 minimizing when she said her attacker was still alive when she left. (*Id.* at XIII:69-70, 104.)

8 Lobato’s car, a red 1984 Pontiac Fiero with the license plate “4NIK8R” was seized
9 by law enforcement in front of the Lobato’s’ house and towed to the Metro Crime Lab for
10 analysis. (Ex. A at IX:21, 74; XI:57; XIII:127; VI:138.) Crime Scene Analyst Louise
11 Renhard (“Renhard”) processed the vehicle on July 22, 2001. (*Id.* at IX:73-74.) Renhard
12 utilized Luminol testing on the interior of the vehicle, which yielded presumptive positive
13 results for the presence of blood on the driver’s side floral seat cover, the driver’s side
14 factory installed grey seat cover, the driver’s side interior door panel and the driver’s side
15 floor board. (*Id.* at IX:89-91.) Renhard noted that the vehicle was old and not very clean,
16 however, the seat covers were very clean as though they had been laundered. (*Id.* at IX:94-
17 94.)

18 DNA analyst Thomas Wahl (“Wahl”) conducted further testing on the areas which
19 yielded presumptive positive chemiluminescent (Luminol) results for blood. (*Id.* at V:152,
20 154, 159-60.) Wahl utilized phenolphthalein testing, which yielded presumptive positive
21 results for the presence of blood on the front left seat cover and the door panel. (*Id.* at
22 V:165.) Wahl was unable to confirm that the presumptive positive areas were blood;
23 however, he noted that human blood which has been degraded through cleaning solutions
24 would not yield a confirmatory result. (*Id.* at V:167-68, 215.)

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1 **2. Lobato's Case-in-Chief.**

2 **a. Lobato's witnesses and experts.**

3 The defense called Diann Parker to testify regarding Bailey having beaten and
4 sexually assaulted her on July 1, 2001. (Ex. A at XIV:14-16, 18-21, 22-23.) Parker testified
5 she knew that Bailey stayed behind the Nevada State Bank on West Flamingo and Arville.
6 (*Id.* at XIV:24.) On cross-examination, Parker stated that Bailey often traded sex for drugs.
7 (*Id.* at XIV:34-35.) Parker was present at the crime scene early on Monday, July 9th, and
8 talked to the Detectives who sent someone to her home. (*Id.* at XIV:16-17.)

9 The defense called Dr. Michael Laufer ("Dr. Laufer") as an expert witness. Dr.
10 Laufer, an emergency room trauma surgeon and expert in forensic medicine, testified that
11 based on his experience, he believed that scissors may have inflicted the injuries on Bailey.
12 (*Id.* at XII:52-53, 71-72, 85.) He further testified that the blunt force trauma could be caused
13 by someone holding the scissors in a closed fist, "like brass knuckles." (*Id.* at XII:65.)
14 Based on the distance between injuries, Dr. Laufer testified that the spacing between handles
15 was consistent with someone with a large hand, and that Lobato's hand was too small to
16 have caused the injuries. (*Id.* at XII:66-67, 93-94.)

17 On rebuttal, the State recalled Dr. Simms, who testified that he disagreed with Dr.
18 Laufer for several reasons, being that scissors are commonly used as a stabbing tool, and are
19 not opened up; moreover, when scissors are used to stab, the resulting wound is specific.
20 (*Id.* at XVIII:215-17.) Furthermore, the wounds had no tissue bridging - or blunt force
21 trauma across the wound - which Dr. Simms testified meant the wounds were caused by
22 sharp force injuries that severed the tissue. (*Id.* at XVIII:217-18.) Dr. Simms further
23 testified that the wound to the carotid artery could not be caused by scissors: he stated this
24 would have been anatomically impossible, and the perpetrator would have had to cut half the
25 neck to get down to the carotid artery with scissors. (*Id.* at XVIII:221-22.) Dr. Simms
26 testified that the patterned injuries on the abdomen could only be caused by prolonged
27 pressure after death, not by a hand holding scissors. (*Id.* at XVIII:227.) Generally, Dr.

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1 Simms testified that none of the wounds could have been caused by scissors. (*Id.* at
2 XVIII:231, 234-35.)

3 The defense also called Shelley Pierce-Stauffer, an investigator with the Clark
4 County Coroner's office, and Sergeant Kevin Manning, a sergeant with LVMPD Homicide
5 Unit. (*Id.* at XV:49, 57.) Defense elicited testimony that the police had withheld evidence
6 of Bailey's penis having been amputated from the public. (*Id.* at XV:52-53, 62-64.)

7 The State stipulated to a footwear examination report done by William J. Bodziak, a
8 forensic consultant who was a specialist in the area of shoe impressions and footwear, who
9 had been an expert in prior proceedings. (*Id.* at XV:133-34.) The report found that the shoe
10 impressions found at the crime scene did not match those of Lobato. (*Id.* at XV:136-37.)

11 Finally, Lobato's defense called Brent Turvey ("Turvey") as a defense expert in the
12 fields of forensic science, crime reconstruction, and crime scene analysis. (*Id.* at XVI:96-97,
13 109.) Turvey testified to the physical evidence found at the crime scene and in Lobato's
14 vehicle, and DNA evidence from the sexual assault kit. Turvey further reviewed Dr.
15 Simms' testimony as to the sexual motive behind the injuries. (*Id.* at XVI:120.) Turvey
16 testified that, in his opinion, there was no physical evidence associating Lobato with the
17 crime scene; that there was no physical evidence associating Lobato's vehicle with the crime
18 scene; that there was exculpatory physical evidence that was not examined; that the DNA
19 evidence from the sexual assault kit was inconsistent with Lobato; and that, in his opinion,
20 the homicide was more consistent with a male-on-male homicide. (*Id.* at XVI:119-21.)

21 **b. Lobato's alibi witnesses.**

22 Jo Wuori ("Wuori") (fka Jo Dennert), Lobato's neighbor, stated she saw Lobato ride
23 a four-wheeler in front of her house sometime between 11:00 a.m. and 1:00 p.m. on July 8,
24 2001. (Ex. A at XV:9.) In her May 2002 testimony, Wuori never mentioned the time range
25 during which she saw Lobato, or provide details as to what Lobato was doing. (*Id.* at
26 XV:14-15.) Wuori did not remember Lobato's vehicle being parked in front of her house.
27 (*Id.* at IX:13.) Wuori admitted that she was friendly with the Lobato family and talked with

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1 Rebecca and Larry on a daily basis back then. (*Id.* at XV:18-19.) Wuori further admitted
2 that, the day after Lobato was arrested, Rebecca discussed the July 8th date with her. (*Id.* at
3 XV:19.) Rebecca gave Wuori's name to the defense investigator. (*Id.* at XV:27.)

4 Robert McCrosky ("Robert"), and his wife, Wanda ("Wanda"), were the Lobato's'
5 neighbors. Robert testified that he remembered seeing Lobato's' car at some point in the
6 first part of July 2001, and that he did not see it move, although he and his wife were out of
7 town for two or three days around July 4, 2001. (*Id.* at XVI:10, 12, 14.)

8 Heather McBride, who lived in Caliente in 2001, testified that, although she saw
9 Lobato on between July 1st, 3rd, and 4th, 2001, she did not remember seeing Lobato at any
10 time after July 4, 2001. (*Id.* at XVI:58.) However, in her statement to police, Heather said
11 Lobato confided in her about her attack on July 5th or 6th, which is after July 4, 2001. (*Id.*
12 at XVI:68-69.)

13 Clint Hohman ("Clint") testified he saw Lobato four-wheeling sometime after he
14 went to church on the morning July 8, 2001. (*Id.* at XVII:98-99.) However, Clint admitted
15 he only became a defense witness three years after the first trial, in October 2005, and that
16 Rebecca talked to him after Lobato's arrest. (*Id.* at XVII:103-04.) Clint further admitted
17 Rebecca talked to him on the same day he was testifying. (*Id.* at XVII:106.)

18 Kendre Thunstrom testified that she saw Lobato standing in the driveway of her
19 parents' house between 5 to 6 p.m., on July 8, 2001. (*Id.* at XVII:113.)

20 Shayne Kraft ("Shayne"), Lobato's cousin, testified that she saw Lobato on July 8th,
21 sometime between 6:00 p.m. and 8:00 p.m., when she went to the Lobato's' house to pick up
22 Tiger Balm for her husband. (*Id.* at XV:87-88.) She also saw Lobato on July 4th, for the
23 barbecue at the Lobato's' home, and found Lobato to look sick and pale. (*Id.* at XV:96.)
24 Shayne admitted she talked to Rebecca the day after Lobato was arrested, and she spoke
25 with her several times about Lobato and what she was arrested for. (*Id.* at XV:104.) Shayne
26 further testified that while Lobato was home the week of July 4th, Rebecca was trying to
27 help get Lobato off drugs. (*Id.* at XV:110-11.)

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1 John Kraft ("John"), Shayne's husband, testified he saw Lobato around 7:00 a.m. on
2 July 8th when he went to talk to Larry about taking care of his wife and unborn child while
3 he was away for work. (*Id.* at XV:118-19.) He added that he and Shayne discussed the day
4 of July 8th after Lobato was arrested, but admitted he had never disclosed any of this to the
5 police or told anyone this story until four weeks prior, when he was first contacted by the
6 defense. (*Id.* at XV:129-30, 133.) John admitted that the first time he offered what he
7 testified to in the 2006 trial was four weeks before his testimony in September 2006. (*Id.* at
8 XV:130.)

9 Ashley Lobato ("Ashley"), Lobato's stepsister, testified she spent July 4th with her
10 family. (*Id.* at XVII:123.) She testified that on July 8th, she only saw Lobato in the late
11 afternoon, around 3:00 or 4:00 p.m. (*Id.* at XVII:129, 134.) Ashley further testified that
12 around midnight, Lobato was getting ready to return to Vegas. (*Id.* at XVII:132.) Ashley
13 testified that Lobato was in Vegas from July 2nd until July 8th. (*Id.* at XVII:133.) Ashley
14 admitted she didn't remember whether she saw Lobato on July 5th, July 6th, or July 7th,
15 because she was in and out of the house all week. (*Id.* at XVII:125, 126, 161.) She also
16 admitted Lobato's car could have moved without her knowing about it. (*Id.* at XVII:157.)
17 Rebecca and Larry had a cell phone that Ashley and Lobato were allowed to borrow. (*Id.* at
18 XVII:149.) Ashley testified that she was noticed as an alibi witness for the defense in the
19 first trial, but the Court, after her October 3, 2006 testimony, took judicial notice of the fact
20 that Ashley was listed as an alibi witness for the first time on October 20, 2005. (*Id.* at
21 XVII:170-71, 173-74.)

22 Larry Lobato testified that Lobato returned to Panaca on July 2nd, and that she went
23 to the doctor the morning of July 5, 2001. (*Id.* at XVII:178-79.) He further testified that he
24 saw Lobato every morning between July 2nd and July 9th, 2001. (*Id.* at XVII:185.) Larry
25 testified Rebecca took Lobato to the doctor on July 5th, and then took the day off work on
26 July 6th in order to take care of Lobato, who was sick. (*Id.* at XVIII:44-45.) On July 7th,
27 Larry went to work from 4:00 p.m. to 2:00 a.m. on July 8th, and that Lobato came to his

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1 workplace for approximately forty-five minutes around 6:00 p.m. on July 7, 2001. (*Id.* at
2 XVIII:186-87.) Larry testified that Austria and Brown had driven Lobato to his workplace.
3 (*Id.* at XVIII:187.) He further testified that Rebecca picked Lobato up around 7:00 p.m.,
4 and that when he got home, he saw Lobato sleeping. (*Id.* at XVIII:187-88, 189.) Larry
5 stated that he woke Lobato around 7:00 a.m. on July 8, 2001, because John Kraft had come
6 over. (*Id.* at XVIII:191.) He stated he saw Lobato around noonish, and again after midnight
7 on July 9th, before Lobato left for Las Vegas. (*Id.* at XVIII:193-94, 196; XVII:42.) Lobato
8 called Larry the morning of July 13th, and Larry went to pick her up in Las Vegas. (*Id.* at
9 XVII:197; XVIII:49.) Lobato was at home in Panaca on July 14th through 20th. (*Id.* at
10 XVIII:51.) Larry admitted he saw scratch marks on Lobato's belly sometime between the
11 14th and the 20th. (*Id.* at XVIII:52.) He also admitted that he had not told anybody before
12 about the morning of July 8th, when John Kraft visited. (*Id.* at XVIII:54.) Larry agreed he
13 would do anything he could to help his daughter (he did not testify at the first trial). (*Id.* at
14 XVIII:54.) Larry couldn't remember whether Carrington was at his house the week of July
15 2nd through July 9th, but remembered something happened with Carrington's grandfather.
16 (*Id.* at XVIII:64.)

17 Rebecca, Lobato's stepmother, testified Lobato returned from Las Vegas on July 2,
18 2001. (*Id.* at XVIII:78.) On July 5th, Rebecca called the doctor about Lobato because
19 Lobato thought she was being poisoned, and on July 6th, Rebecca stayed home from work to
20 take care of Lobato. (*Id.* at XVIII:95, 156.) In July 2001, Rebecca had a cell phone and a
21 landline number. (*Id.* at XVIII:87.) On July 6, 2001, Rebecca's cell phone called Larry's
22 work, the Hide Away Bar, at 9:50 p.m., despite Rebecca stating she was at home. (*Id.* at
23 XVIII:97-98.) From her home phone, several calls were made on July 6, 2001: to Doug
24 Twining's cell phone at 1:11 p.m., the Hide Away bar, an unknown number, Doug's house
25 phone at 2:12 p.m., Doug's cell phone at 4:51 p.m., the Pioche Sheriff's Department at 5:27
26 p.m., and to the Hide Away again at 8:38 p.m. (*Id.* at XVIII:110-14.) Rebecca testified that
27 the phone call she made to the Sheriff's Department was to request a jumpsuit for Larry,

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1 despite testifying in May 2002 that the phone call to the Sheriff was probably because she
2 was looking for her truck. (*Id.* at XVIII:165.)

3 Rebecca returned to work on July 7th. On July 7th, the cell phone made and
4 received several calls to and from the Lobatos' home, the Hide Away, and family members,
5 including a call to the Lobatos' landline at 8:35 a.m. (*Id.* at XVIII:98-100.) The landline
6 called the cell phone at 8:37 a.m., Lorenzo's parents at 9:37 a.m., Doug's cell phone at 9:39
7 a.m., Doug's home at 12:41 p.m., and again Doug's cell phone at 9:19 p.m. (*Id.* at XVIII:
8 98-100; 114-16.) The landline also made calls to the Hide Away bar on that day, at 4:08
9 p.m., 4:20 p.m., 4:26 p.m., 5:05 p.m., 7:04 p.m., and 8:38 p.m. (*Id.* at XIX:116-17.)
10 Rebecca claimed that she was in possession of her cell phone on July 7th. (*Id.* at
11 XVIII:115.) Rebecca testified that on July 7th, around 4:05 p.m., she went to the Hide
12 Away Bar to stay for a couple of hours and visit with her husband, before leaving around
13 7:30 p.m. (*Id.* at XVIII:123-34.) Rebecca stated that she then had to return to the bar
14 around 8:15 p.m. to pick up Lobato because there was a message left asking her to call her
15 husband at the bar. (*Id.* at XVIII:124.) Larry had testified Rebecca picked Lobato up
16 around 7:00 p.m. (*Id.* at XVII:187-88.) Rebecca stated she and Lobato were not fighting on
17 July 5th or July 6th, and that Carrington was around on a daily basis on the 5th, 6th, 7th, and
18 8th of July. (*Id.* at XVIII:127-28.) Rebecca testified that Carrington came over on the
19 evening of July 7th, around 8:30 p.m. (*Id.* at XVIII:128-29.) Rebecca testified on cross-
20 examination that she and Lobato fought the evening of July 7th until around 11:00 p.m.
21 because Rebecca did not want Lobato to return to Las Vegas to the people she believed were
22 poisoning her. (*Id.* at XVIII:149-50.) In her 2002 testimony, Rebecca failed to mention she
23 and Lobato had an argument. (*Id.* at XVIII:153-54.)

24 On July 8th, a call was placed from the cell phone to the landline at 10:17 a.m. (*Id.*
25 at XVIII:101.) The landline called Doug's cell phone or landline at 11:57 a.m., 5:06 p.m.,
26 and 6:38 p.m. Rebecca testified that Lobato left Panaca for Las Vegas around 1:00 a.m. on
27 July 9th, when Doug Twining picked her up. (*Id.* at XVIII:108.)

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1 Rebecca testified that she did not see Lobato between July 9th at 1:00 a.m. and
2 Friday, July 13. (*Id.* at XVIII:154.) On July 13, Rebecca called the doctor asking for some
3 anxiety and depression medication for Lobato, and the doctor provided a prescription for
4 Ativan that Rebecca filled that day. (*Id.* at XVIII:156-57, 182.) Rebecca testified Lobato
5 received another prescription on July 16, for Prozac. (*Id.* at XVIII:158.)

6 After Lobato was arrested on July 20th, Rebecca admitted she made a phone call
7 from the landline to Doug's landline at 7:20 p.m., but said she didn't remember the phone
8 call. (*Id.* at XVIII:163.) On July 24th at 7:38 p.m. and July 25th at 9:00 a.m. and 12:49
9 p.m., Rebecca likewise admitted phone calls took place from her landline to Doug's
10 landline, but stated that she did not recall them. (*Id.* at XVIII:162-64.) She admitted it was
11 possible that she had conversations with Doug after Lobato was arrested. (*Id.* at XVIII:164.)
12 Rebecca also admitted she "vaguely" remembered talking to a few people, including
13 Carrington, Shayne, Wuori, and Allen about what happened, and about the July 8th date
14 with Carrington, Shayne, and Wuori. (*Id.* at XVIII:166-68.)

15 Twining testified Lobato returned to Panaca from his house in Las Vegas on July 2,
16 2001. (*Id.* at XIX:33-34.) He testified he picked her up in Panaca in the early hours of July
17 9th. (*Id.* at XIX:36.) Twining admitted on cross-examination that after July 9th, he and
18 Lobato wanted to "lay low" and did not leave the house other than for food. (*Id.* at XIX:68.)
19 On July 9th or 10th, he and Lobato watched the news, including a news report regarding a
20 homicide. (*Id.* at XIX:69-71.) Twining testified there had been multiple phone calls
21 between July 2nd and July 9th between himself and Lobato. (*Id.* at XIX:36.) Twining
22 admitted that when he met Lobato, possibly at the end of April, he did meth with
23 Pyszkowski and Lobato. (*Id.* at XIX:54-55.) He admitted he wanted to be in a relationship
24 with Lobato. (*Id.* at XIX:56.) Twining testified he did not provide the phone records from
25 his landline. (*Id.* at XIX:63.) Twining admitted that he spoke numerous times to Rebecca
26 after Lobato was arrested and before speaking to the police on August 2, 2001, probably a
27 dozen times. (*Id.* at XIX:64, 67.) He also stated he spoke to Larry about the date of July 8th

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1 before the police interviewed him. (*Id.* at XIX:49.) He also exchanged numerous phone
2 calls with Lobato between July 20th and August 2nd. (*Id.* at XIX:67.)

3 **3. The Verdict.**

4 On October 6, 2006, the jury found Lobato guilty of Voluntary Manslaughter with
5 Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On February 2,
6 2007, the Court sentenced Lobato to the Nevada Department of Corrections as follows:
7 Count 1 - 48 to 120 months, plus an equal and consecutive 48 to 120 months for the Deadly
8 Weapon enhancement; Count 2 - 60 to 180 months, consecutive to Count 1. Additionally,
9 the Court imposed a special sentence of lifetime supervision and ordered Lobato to register
10 as a sex offender upon release. The Judgment of Conviction was filed on February 14,
11 2007.

12 **4. The Appeal.**

13 Lobato's initial appeal to the Nevada Supreme Court was unsuccessful. *Lobato v.*
14 *State*, 281 P.3d 1196 (Nev. 2009). On August 1, 2011, Lobato filed a new appeal making
15 four arguments: (1) the District Court failed to consider new evidence of actual innocence,
16 (2) the State failed to disclose exculpatory and impeachment evidence to Lobato (i.e., a
17 *Brady* claim⁷), (3) ineffective assistance of counsel of Lobato's criminal defense attorney,
18 and (4) the District Court failed to hold a *Brady* hearing or an ineffective assistance of
19 counsel hearing. The Nevada Supreme Court issued an "Order Affirming in Part Reversing
20 in Part and Remanding." *See Lobato v. State*, 385 P.3d 618 (Nev. 2016).

21 At the outset, the Court rejected Lobato's *Brady* claims against the Detectives,
22 finding that "Lobato failed to demonstrate that the evidence was withheld by the State or
23 that it was material, that is, that there was reasonable probability that the evidence would
24 have affected the outcome of trial." The Court did agree with Lobato *on her ineffective*

25 _____
26 ⁷ In *Brady v. Maryland*, 373 U.S. 83 (2009), the Court held "that the suppression by the prosecution
27 of evidence favorable to an accused upon request violates due process where the evidence is material
either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See*
Strickler v. Greene, 527 U.S. 263, 280 (1999).

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1 *assistance of counsel* claim. In that claim, Lobato “submitted affidavits from three forensic
2 entomologists who opined” that the victim’s time of death coincided with a time period that
3 Lobato was physically in Panaca. (*Id.*) The Court remanded the case on these grounds.

4 In short, the Nevada Supreme Court remanded the case due to the failures of
5 Lobato’s own criminal defense counsel. It found no wrongdoing on the part of the
6 Detectives. (*Id.*)

7 **F. THE EVIDENTIARY HEARING.**

8 From October 9, 2017 to October 13, 2017, an evidentiary hearing was held pursuant
9 to Lobato’s post-conviction Petition for Writ of Habeas Corpus, “to address the alleged
10 ineffective assistance of Defendant’s trial counsel.” (*See* Decision and Order at 3, **Exhibit**
11 **X.**) The court issued its written Decision and Order on December 19, 2017. (*Id.*) After
12 summarizing the evidentiary hearing testimony, the court analyzed whether “Defendant’s
13 counsel was ineffective for failing to provide evidence that narrowed Decedent’s time of
14 death . . .” (*Id.* at 41.) First, the court found that Lobato presented evidence of a valid alibi
15 and that the time of death was “a crucial aspect of [Lobato’s] case.” (*Id.* at 47.) (The State
16 offered contradicting scientific evidence at the evidentiary hearing.) Second, the court
17 concluded that Lobato’s own attorneys had “failed to meaningfully consult with [both] a
18 forensic pathologist . . . [and] a forensic entomologist.” (*Id.* at 47-51.) The court granted
19 Lobato’s Petition for Writ of Habeas Corpus and ordered a new trial. (*Id.* at 54.) The
20 district court did not find any wrongdoing on the part of the defendant detectives and did not
21 find plaintiff innocent. The court only concluded that a new trial was proper because
22 Lobato’s own attorneys failed her, and the jury should have heard the evidence from the
23 entomologists.

24 In this civil case, the LVMPD Defendants retained the same expert that testified for
25 the State in the evidentiary hearing regarding the entomology evidence. (*See* Expert Reports
26 of Jeffrey Wells, Ph.D., **Exhibit Y.**) Lobato also identified one expert who testified at the
27 evidentiary hearing. (Expert Report of Jeffery K. Tomberlin, Ph.D., **Exhibit Z.**) The

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1 reports generally confirm that the reason Lobato's criminal case was remanded for a new
2 trial was due to a scientific dispute as to the time of death. This scientific dispute cannot be
3 imputed to the Detectives and whether probable cause existed to arrest Lobato.

4 G. AFTERMATH.

5 1. The dismissal of the criminal charges.

6 On December 29, 2017, a hearing was held regarding the case. The State informed
7 the court of the following:

8 . . . the District Attorney's Office has made a decision regarding this case and
9 that prior to dismissing it, the State would like to place the following on the
10 record: this crime occurred in July 2001 and in May 2002 Kristin Lobato was
11 tried for open murder with use of a deadly weapon and sexual penetration of
12 a dead human body for the brutal murder of Duran Bailey; at the conclusion
13 of the trial, 12 jurors unanimously rejected the Defendant's alibi and found
14 beyond reasonable doubt that she was guilty of first degree murder . . . On
15 direct appeal, the Nevada Supreme Court reversed the Defendant's
16 conviction in September 2004 due to an erroneous ruling the trial court made.
17 The State was not responsible for the reversal. At the conclusion of the 2006
18 re-trial the Defendant was again convicted . . . Once again, all 12 jurors
19 unanimously rejected the Defendant's alibi and found beyond a reasonable
doubt that Ms. Lobato was responsible for the death of Duran Bailey. [The
case was again remanded in 2016 for ineffective assistance and] the State was
in no way responsible for the reversal of the second trial. Now, the State was
faced with the prospect of trying the case for a third time due to no fault of its
own, 17 years after the crime occurred and also, by the time a third trial could
proceed, the Defendant would be immediately eligible for parole if convicted
again. Although the State believes in her guilt as well as 24 members of the
community who unanimously found the Defendant guilty beyond a
reasonable doubt, their limited resources are such that they are electing not to
proceed with a third trial, considering the Defendant has served more than 15
years in prison.

20 (See 12/29/2017 Court Minutes, **Exhibit AA**. The charges against Lobato were dismissed
21 with prejudiced.)

22 2. Clark County Conviction Review Unit.

23 After dismissal of the criminal charges, Lobato filed an application with the Clark
24 County Conviction Review Unit ("CRU"). The CRU reviewed Lobato's preliminary
25 hearing transcript, both trial transcripts, and "the complete investigation conducted by
26 [LVMPD], and all of the motions, petitions, and other documents in the case." (Conviction
27 Review Letter, **Exhibit BB**.) The CRU stated its role is "not intended to function as a

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1 “thirteenth juror.” (*Id.*) It noted that the issues raised by Lobato “have been presented to
2 and considered by two separate juries, and have twice been answered with unanimous
3 findings of guilty beyond a reasonable doubt” and that the CRU “would simply be
4 substituting its own judgment for that of twenty-four jurors.” (*Id.*)

5 **III. LEGAL STANDARDS**

6 **A. SUMMARY JUDGMENT STANDARDS.**

7 Under Rule 56 of the Rules of Federal Procedure, “[a] party may move for summary
8 judgment, identifying each claim or defense - - or the part of each claim or defense - - on
9 which summary judgment is sought [and] [t]he court shall grant summary judgment if the
10 movant shows that there is no genuine dispute as to any material fact and the movant is
11 entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). It is well established that the
12 purpose of summary judgment “is to isolate and dispose of factually unsupported claims.”
13 *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). The rule, however, is not a “procedural
14 short cut,” but a “principal tool [] by which factually insufficient claims or defenses [can] be
15 isolated and prevented from going to trial with the attendant unwarranted consumption of
16 public and private resources.” *Id.* at 327. The moving party bears the initial burden of
17 demonstrating the absence of a genuine dispute as to material fact. *Devereaux v. Abbey*,
18 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). “A party asserting that a fact cannot be or is
19 genuinely disputed must support the assertion by: (A) citing to particular parts of materials
20 in the record, including depositions, documents . . . affidavits or declarations . . . or other
21 materials; or (B) showing that the material cited do not establish the absence or presence of
22 a genuine dispute . . .” Fed.R.Civ.P. 56(c)(1)(A) and (B).

23 **B. 42 U.S.C. §1983 STANDARDS.**

24 Section 1983 is not itself a source of substantive rights, but merely the procedural
25 vehicle by which to vindicate federal rights elsewhere conferred. *See Albright v. Oliver*,
26 510 U.S. 266, 271 (1994). To make out a prima facie case under §1983, a plaintiff must
27 show that a defendant: (1) acted under color of law, and (2) deprived the plaintiff of a

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1 constitutional right. *See Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1989). The
 2 Detectives do not dispute that they acted under color of law. Therefore, the task of this court
 3 is to determine whether the Detectives violated the Constitution. *See Albright*, 510 U.S. at
 4 271. In addition, the Detectives have raised the affirmative defense of qualified immunity.

5 A defendant in a §1983 action is entitled to qualified immunity from damages for
 6 civil liability if his conduct did not violate clearly established statutory or constitutional
 7 rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S.
 8 800, 818 (1982). The Supreme Court has often stressed the importance of deciding qualified
 9 immunity “at the earliest possible stage in litigation” in order to preserve the doctrine’s
 10 status as a true “immunity from suit rather than a mere defense to liability.” *Hunter v.*
 11 *Bryant*, 502 U.S. 224, 227 (1991).

12 “In determining whether an officer is entitled to qualified immunity, [a court]
 13 consider[s] (1) whether there has been a violation of a constitutional right; and (2) whether
 14 that right was clearly established at the time of the officer’s alleged misconduct.” *Lal v.*
 15 *California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation omitted). Consequently, at
 16 summary judgment, a court can “only” deny an officer qualified immunity in a §1983 action
 17 “if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show
 18 that the officer’s conduct violated a constitutional right, and (2) the right at issue was clearly
 19 established at the time of the incident such that a reasonable officer would have understood
 20 [his] conduct to be unlawful in that situation.” *Torres v. City of Madera*, 648 F.3d 1119,
 21 1123 (9th Cir. 2011).

22 **IV. LEGAL ARGUMENT**

23 Lobato’s Complaint alleges ten causes of action: (1) a 42 U.S.C. §1983 Involuntary
 24 Confession claim; (2) a 42 U.S.C. §1983 Fourteenth Amendment due process claim for
 25 fabricating false evidence, withholding exculpatory evidence, and coercive investigative
 26 techniques; (3) 42 U.S.C. §1983 false arrest/malicious prosecution; (4) a 42 U.S.C. §1983
 27 failure to intervene; (5) a 42 U.S.C. §1983 civil conspiracy; (6) state law malicious

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1 prosecution; (7) state law abuse of process; (8) state law intentional infliction of emotional
2 distress (“IIED”); (9) state law civil conspiracy; and (10) state law indemnification.

3 **A. COUNT I: 42 U.S.C. §1983 INVOLUNTARY CONFESSION**

4 Lobato’s first claim for relief involves her recorded statement. (Ex. E, Ex. I)
5 According to the Complaint, the Detectives conspired to “force[] [Lobato] to incriminate
6 herself falsely and against her will, in violation of her rights secured by the Fifth and
7 Fourteenth Amendments” and used the “confession” against Lobato “to her detriment
8 throughout her criminal case.” (ECF No. 1 at ¶128.) More specifically, Lobato alleges the
9 Detectives “rushed to interrogate [Lobato] without her parents present, declined to inform
10 [Lobato] of what crime they were investigating and when it took place, provided [Lobato]
11 with details of the Duran Bailey murder and suggested those details to her, used
12 psychologically manipulative tactics including discussing her past trauma and history of
13 sexual abuse, asked leading questions designed to create the incorrect impression she was
14 involved in the Bailey murder or that she did not recall the details of her attack, and
15 selectively recorded the interview to manipulate Plaintiff’s statement (i.e., had prior
16 conversations that were not recorded)” and in their reports stated that Lobato “had confessed
17 to the Bailey murder. . .” (Lobato Interrog. Answers, at No. 5, 6, & 10, **Exhibit CC**.)

18 Discovery revealed that Lobato’s coerced confession claim is unsupported.
19 According to Lobato and her experts, the statement that Lobato provided the Detectives is
20 truthful and accurate. However, Lobato (and her experts) complain that the Detectives
21 failed to realize she was discussing a different, unrelated event. This same theory was
22 argued by Lobato at both of her criminal trials and rejected by twenty-four jurors.

23 **1. Fifth and Fourteenth Amendment coercive interrogation law.**

24 Lobato alleges that the Detectives violated her Fifth and Fourteenth Amendment
25 rights to be free from a coercive interrogation.

26 The Fifth Amendment provides that no person shall be “compelled in any criminal
27 case to be a witness against himself.” U.S. Const., AMEND. V. The Fifth Amendment’s

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1 self-incrimination clause encompasses a proscription against using coerced confessions
2 against a suspect.” *See Crowe v. Cty. of San Diego*, 593 F.3d 841, 862 (9th Cir. 2010). “A
3 coercive interrogation exists when the totality of the circumstances shows that the officer’s
4 tactics undermined the suspect’s ability to exercise [her] free will.” *Cunningham v. City of*
5 *Wentachee*, 345 F.3d 802, 810 (9th Cir. 2003) (quoting *Haynes v. Washington*, 373 U.S.
6 503, 513 (1963)); *see also Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (“Under
7 the Fifth Amendment, a confession is coerced or involuntary if the defendant’s will was
8 overborne at the time he confessed.”) Thus, the Fifth Amendment protects against claims
9 that a coerced confession was used against a suspect in criminal proceedings. In
10 determining whether a statement is coerced, “[c]ourts . . . often consider the following
11 factors: the youth of the accused, [her] intelligence, the lack of any advice to the accused of
12 his constitutional rights, the length of the detention, the repeated and prolonged nature of the
13 questioning, and the use of physical punishment such as the deprivation of food or sleep.”
14 *Tobias v. Arteaga*, 996 F.3d 571, 581 (9th Cir. 2021) (quoting *United States v. Haswood*,
15 350 F.3d 1024, 1027 (9th Cir. 2003)). Even if an officer commits a “clear-cut” *Miranda*
16 violation, “that fact alone is not sufficient to establish that the resulting confession was
17 involuntary.” *Bradford v. Davis*, 923 F.3d 599, 616 (9th Cir. 2019).

18 A person subjected to coercive interrogation techniques can also bring a substantive
19 due process claim under the Fourteenth Amendment. *See Tobias*, 996 F.3d at 584 (citing
20 *Stoot v. City of Everett*, 582 F.3d 910, 928 (9th Cir. 2009)). The substantive due process
21 standard requires showing that an officer engaged in an “abuse of power [that] ‘shocks the
22 conscience’ and ‘violates the decencies of civilized conduct’.” (*Id.*) The Supreme Court has
23 described “police torture or other abuse” as the type of claim cognizable under the
24 Fourteenth Amendment.” *Chavez v. Martinez*, 538 U.S. 760, 773-74 (2003).

2. Both Lobato and her experts agree that the Detectives did not coerce a false statement.

Here, there is no evidence that the Detectives' interview of Lobato was coercive, and there is no evidence it violated either the Fifth or Fourteenth Amendment.

Fifth Amendment

Lobato's statement to the Detectives does not meet any of the requirements necessary to establish a Fifth Amendment violation. As stated above, courts examine the youth of the accused, her intelligence, failure to provide *Miranda* rights, the length of the interview and prolonged questioning, and the use or threat of physical punishment. Lobato admits she (1) was a legal adult, (2) was a high school graduate who was living on her own, (3) was interviewed for under an hour, (4) was read (and understood) her *Miranda* rights, and (5) was never physically threatened with incarceration, punishment, or even leniency for cooperation. (Ex. H at 133-135, 162, 167; Ex. I.) Thus, Lobato's own admissions end this claim.

Lobato retained two expert witnesses who rendered opinions regarding her statement: Susan Peters (police practices expert) and Dr. Allison Redlich (false confession expert). First, with respect to age and cognitive abilities, both experts agree that there was nothing wrong with the Detectives interviewing Lobato. (Peters Depo. at 27, **Exhibit DD**; Redlich Depo. at 33, **Exhibit EE**.) Second, both experts agree there is no evidence that Lobato did not understand her *Miranda* rights. (Ex. DD 27-28; Ex. EE at 33-35; Ex. G.) Third, with respect to the length of the interview, both experts agree that it was not too long and did not overbear Lobato's will – in fact, Peters felt the interview was "too short," and they should have moved Lobato to a different location (i.e., arrested her sooner). (Ex. DD at 28-33; Ex. EE. at 50.) Fourth, both experts agree that the Detectives did not threaten or use punitive measures to secure information. (Ex. DD at 35; Ex. EE at 52.) Fifth, they offered no evidence that the Detectives lied to Lobato or attempted to coerce her. (Ex. EE at 64.)

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1 Sixth, and finally, neither expert ever found any evidence that either detective even labeled
2 the statement a “confession.” (Ex. DD at 54-55.)

3 In attempting to salvage the coerced confession claim, both Lobato and her experts
4 make very general and vague criticisms of the Detectives’ interview. Lobato complains that
5 the Detectives “were going a certain direction” with their questions and “implied” the
6 answer. (Ex. H at 135-137.) Peters complained that the statement was rushed and not
7 thorough. (Ex. DD at 26-37.) Both experts characterize this as a “unique” case because it
8 is their opinion that Lobato’s confession is truthful, but the Detectives failed to recognize
9 she was “confessing” to a different incident. (*See e.g.*, Ex. EE at 65, 68.) Regardless of
10 whether the Detectives asked leading questions or “implied” answers, Lobato is firm that her
11 statement is truthful, and she did not fall for the Detectives’ tactics. In other words, she
12 withstood their efforts to elicit a false confession.

13 Finally, Lobato, in her Complaint, has made several other arguments regarding her
14 statement that are easily defeated. The Complaint alleges the Detectives “only recorded a
15 portion of their questioning and her answers.” (ECF No. 1 at ¶94.) Lobato denies that the
16 Detectives “selectively recorded” her statement and admits all of the information she told
17 the Detectives can be found in her statement. (Ex. H at 167.) The Compliant also says the
18 Detectives “suggested facts to her about the crime.” (ECF No. 1 at ¶94.) Lobato admits that
19 the Detectives accepted her answers and that her statement is accurate. (Ex. H at 137-139,
20 141.) Finally, Lobato agrees her statement gave the Detectives probable cause to arrest her,
21 but that she wishes they had “looked further instead of stopping” their investigation with
22 her. (*Id.* at 170-171.)

23 In sum, it is Lobato’s and her two experts’ opinions that her statement violates her
24 constitutional rights because the Detectives did not interpret it correctly. Lobato complains
25 that based upon her self-serving statement, they intentionally and knowingly misinterpreted
26 her statement to be about the murder of Bailey, when they knew it was not. This is pure
27 speculation, and the Detectives (and the State) remain convinced that probable cause exists

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1 that Lobato committed the crime. Lobato's theory was put forth to two separate criminal
2 juries who rejected it. There is no constitutional law that requires detectives to accept
3 everything a murder suspect says as true. The Detectives are allowed to reach their own
4 conclusions on the evidence so long as they provide all of the evidence to the district
5 attorney.

6 ***Fourteenth Amendment***

7 The Fourteenth Amendment standard is much higher than the Fifth Amendment
8 standard. Lobato must provide this court with "conscience-shocking" behavior that violates
9 "the decencies of civilized conduct." Lobato admits that the Detectives obtained a truthful
10 statement from her and that they were "nice" and "compassionate" during the interview.
11 Ex. H at 137-139, 141, 195. Again, her only complaint is that the Detectives (and two
12 criminal juries) believed she was talking about the Bailey murder and not a separate
13 incident. This is not conscience-shocking.

14 **3. Qualified immunity.**

15 If this court finds a triable issue of fact on Lobato's involuntary confession claim, the
16 plaintiff must then provide this court with "clearly established" law that existed in July 2001
17 that would have put the Detectives on notice of their unconstitutional behavior.

18 First, with respect to the Fifth Amendment claim, the particular circumstances of
19 Lobato's interview do not present the same sort of confluence of features that the Ninth
20 Circuit has previously held to be coercive. *See, e.g., Cunningham v. Perez*, 345 F.3d 802,
21 810-11 (9th Cir. 2003) (Ninth Circuit held that an interrogation was not coercive where the
22 officer questioned a suspect for 8 hours even after the suspect denied guilt, did not allow the
23 suspect to "call his therapist," and told the suspect that he "has put people in prison." The
24 court also found in part that "emotionalism and confusion do not invalidate confessions" or
25 render an interrogation "coercive" or undermine the suspect's "free will." *Id.* (collecting
26 cases with "far more outrageous" interrogation techniques); *Taylor v. Maddox*, 366 F.3d
27 992, 1015-16 (9th Cir. 2004) (confession was clearly involuntary where 16-year-old suspect

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1 was arrested late at night, questioned until 3:00 AM, threatened with a jab to the face, and
 2 had his repeated requests for counsel denied), *overruled on other grounds by Murray v.*
 3 *Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014); *Gladden v. Holland*, 366 F.2d 580, 582
 4 (9th Cir. 1966) (finding coercion where officers ignored a request for counsel but also
 5 conducted the interrogation “throughout the night” and called in alleged rape victims to view
 6 the suspect); *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (noting that coercion is
 7 not established where police merely indicate that a cooperative attitude would benefit a
 8 minor suspect); *Cunningham v. Perez*, 345 F.3d at 810 (finding no coercion where
 9 interrogation went for eight hours without a break, officers continued to question the suspect
 10 after claims of innocence, and officers played on the suspect’s fear of prison).

11 Qualified immunity is also appropriate on Lobato’s Fourteenth Amendment right to
 12 substantive due process. *See, Stoot*, 582 F.3d at 928. Although this claim (unlike the Fifth
 13 Amendment claim) does not require a showing that the confession was used against Lobato,
 14 “[t]he standard ... is quite demanding,” requiring something akin to “police torture or other
 15 abuse” or comparable conduct that “shocks the conscience.” The facts of this case are
 16 materially different from previous cases in which the Ninth Circuit has found a substantive
 17 due process violation for police conduct during an interrogation. *See, e.g., Cooper v.*
 18 *Dupnik*, 963 F.2d 1220, 1248-50 (9th Cir. 1992) (en banc) (finding a substantive due process
 19 violation when officers subjected a suspect to” hours of mistreatment and what can fairly be
 20 described as sophisticated psychological torture” and intentionally ignored the suspect’s
 21 repeated invocations of his right to counsel and right to silence and for the express “purpose
 22 of making it difficult, if not impossible, for [the defendant] to take the stand in his own
 23 defense”), *overruled on other grounds, Chavez v. Martinez*, 538 U.S. 760, 773 (2003).

24 **B. COUNT II: PLAINTIFF’S 42 U.S.C. §1983 DUE PROCESS/DENIAL**
 25 **OF FAIR TRIAL CLAIM**

26 Lobato’s second claim alleges that her Fourteenth Amendment rights were violated
 27 because the Detectives “fabricated and solicited false evidence, as well as withheld

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1 exculpatory evidence from [Lobato] and from state prosecutors. . . thereby misleading and
 2 misdirecting the criminal prosecution of [Lobato.]” She also claims that the Detectives
 3 “used investigative techniques that were so coercive and abusive that they knew, or were
 4 deliberately indifferent to, the fact that those techniques would yield false information that
 5 was used to convict [Lobato].” (ECF No. 1 at ¶145.) In her interrogatory answers, Lobato
 6 elaborates that the Detectives “made direct or implied threats to witnesses . . . attempting to
 7 drum-up false inculpatory evidence” and “failed to . . . record in written reports statements
 8 made by witnesses before audio recording devices were turned on.” (Ex. CC at Rog No. 1
 9 and 8.)

10 **1. Relevant Fourteenth Amendment law.**

11 “[T]here is a clearly established constitutional due process right not to be subjected
 12 to criminal charges on the basis of false evidence that was deliberately fabricated by the
 13 government.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001). A plaintiff can
 14 prove deliberate fabrication in several ways. The easiest way is for a plaintiff to produce
 15 direct evidence of deliberate fabrication. *See Caldwell v. City and Cty. of San Francisco*,
 16 889 F.3d 1105, 1112 (9th Cir. 2018) (citations omitted). Alternatively, a plaintiff can
 17 produce circumstantial evidence related to a defendant’s motive. *Id.* Under *Devereaux*, a
 18 plaintiff may show a deliberate-fabrication-of-evidence claim in one of two ways:

19 (1) Defendants continued their investigation of [plaintiff] despite the fact they
 20 knew or should have known that [s]he was innocent; or (2) Defendants used
 21 investigative techniques that were so coercive and abusive that they knew or
 should have known that those techniques would yield false information.

22 263 F.3d at 1076. The test is a stringent one. *Gausvik v. Perez*, 345 F.3d 813, 817 (9th Cir.
 23 2003).

24 Finally, any alleged wrongdoing on the Detectives part is superseded by the fact that
 25 the District Attorney reviewed the file and believed (and still believes) that probable cause
 26 existed to arrest and prosecute Lobato. Typically, in a constitutional tort case the “[f]iling of
 27 criminal complaint immunizes investigating officers . . . because it is presumed that the

1 prosecutor filing the complaint exercised independent judgment in determining that probable
2 cause for an accused's arrest exists at the time." *Caldwell v. City and Cty. of San Francisco*,
3 889 F.3d 1105, 1115-16 (9th Cir. 2018) (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th
4 Cir. 1981), *overruled on other grounds by Beck v. v. City of Upland*, 527 F.3d 853 (9th Cir.
5 2008).

6 **2. Analysis of Lobato's fabrication of evidence claim.**

7 **a. Argument No. 1: Lobato generated no evidence of a**
8 **Fourteenth Amendment fabrication of evidence claim.**

9 During discovery, Lobato failed to generate any evidence supporting her fabrication
10 of evidence claim. In her interrogatory responses, Lobato states this claim is based upon her
11 belief that the Detectives: (1) unconstitutionally coerced her confession; (2) manipulated
12 witness interviews by asking leading questions, suggested facts about the crime, and coerced
13 plaintiff's confession; (3) threatened witnesses; and (4) failed to record statements of
14 witnesses prior to turning on recording devices. (Ex. CC at Rog's Nos. 1 and 8)

15 ***Lobato's confession***

16 Any Fourteenth Amendment claim based upon Lobato's alleged "coerced
17 confession" is untenable as a matter of law because the Ninth Circuit is clear that coerced
18 confession claims are not cognizable under a *Devereaux* fabrication-of-evidence theory. *See*
19 *Hall v. City of Los Angeles*, 697 F.3d 1059, 1069-70 (9th Cir. 2012). Further, as discussed
20 directly above, there is no evidence that the Detectives "coerced" a confession from Lobato
21 as she maintains that her statement to the Detectives is truthful and given of her own free
22 will.

23 ***The witness interviews***

24 The Detectives interviewed multiple witnesses during their investigation. Many of
25 the witnesses were alibi witnesses provided to the Detectives by Lobato, herself. (Ex. C.)
26 Det. Thowsen testified that when he met with each witness, he would first introduce himself,
27 then build a rapport with the witness, find out if they had relevant information and, if so,

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1 obtain permission to record them. (Thowsen Depo. at 99:14-100:19, **Exhibit FF**.) Lobato
2 attempts to imply some nefarious motive for Det. Thowsen's practice. However, Lobato's
3 own expert, Sue Peters, agrees that this is standard practice. (Ex. DD at 68:12-15.) And,
4 contrary to Lobato's representations, no witness has ever testified that the Detectives
5 coerced their statements, threatened them, or included false information in their statements.
6 During discovery, Lobato deposed the following criminal trial witnesses: (1) Dixie Tienken,
7 (2) Doug Twining, (3) Stephen Pyszkowski, and (4) Catherine Reininger.

8 Tienken testified that she voluntarily spoke with the Detectives at her house.
9 (Tienken Depo. at 125:9-19, **Exhibit GG**.) She was honest with the Detectives and told the
10 truth.) (*Id.* at 130:2-13.) Her voluntary statement (Ex. J) accurately captures what she told
11 them. (*Id.* at 130:21-131:19.) Tienken did claim that the Detectives stopped and started the
12 tape during her interview, however when asked to review the recording, she could not
13 identify where this occurred. (*Id.* at 132:19137:20.) (Tienken's recorded statement confirms
14 that the tape was only stopped one time – when the tape needed to be turned over. Ex. E.)
15 Tienken also felt that the Detectives tried to ask leading questions, but also admits they did
16 not challenge or attempt to change her answers. (*Id.* at 130:14-20.) Tienken testified
17 truthfully at both Lobato's criminal trials. (*Id.* at 146:13-15.) Further, Tienken testified that
18 the Detectives never threatened her or attempted to get her to change her story. (*Id.* at
19 161:17-163:15.) In fact, the only person to threaten Tienken and attempt to get her to
20 change her story was Lobato's father, Larry. (*Id.* at 151:25-153:1 & 157:7-20⁸.) She
21 offered no evidence of fabricated or withheld evidence.

22 Doug Twining testified that detectives spoke to him for 15-30 minutes before turning
23 on the recorder and, during this time, asked him "the same question in different ways."
24 (Twining Depo. at 120:14-22, **Exhibit II**.) The information in his transcribed statement is

25 _____
26 ⁸ Interestingly, the only individuals who had Tienken sign a false declaration was Lobato's
27 Innocence Project attorneys. (Ex. GG at 126:15-128:17.) The declaration the Innocence Project
drafted and had Tienken sign contained knowingly false information as to when Tienken's initial
conversation with Lobato occurred. (*Id.*; Tienken Decl., **Exhibit HH**.) Lobato herself implies that
the declaration is false as she admits she visited Tienken after July 13, 2001. (Ex. H at 123.)

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1 accurate and is still truthful. (*Id.* at 121:15-122:10 & 124:9-15.) He agrees the Detectives
2 did not “stop and start” the recording and only turned the recorder off one time to turn the
3 tape over. (*Id.* at 121:24-122:18 & 125:2-126:6.) When the recorder was off, Det. Thowsen
4 “just sat there” and did not provide any information or ask any questions. (*Id.* at 126:7-11.)
5 The only complaint Twining could muster against the Detectives is that it was “weird” the
6 way they asked questions because “they would look at one another” and “write things
7 down.” (*Id.* at 122:19-123:2.) He found this intimidating. (*Id.*) Still, Twining maintained
8 he told the Detectives the truth and testified truthfully at Lobato’s criminal trials. (*Id.* at
9 78:12-79:3, 89:24-90:6.) He offered no evidence of fabricated or withheld evidence.

10 Steve Pyszkowski agrees that he spoke with the Detectives “willingly” and that they
11 talked for about 20 minutes before they turned on their recorder. (Pyszkowski Depo. at
12 84:12-85:6, **Exhibit JJ.**) During the unrecorded time period, he claims he told the police
13 their timeline was wrong. (*Id.* at 85:7-86:14.) When they started recording, Pyszkowski
14 admits he did not bring up the timeline issue, and it is found nowhere in his recorded
15 statement. (*Id.* at 86:15-87:9; Ex. K.) Pyszkowski admits that the Detectives never asked
16 him to change his story or lie. (*Id.* at 88:1-8, 93:1-3.) He acknowledges that the Detectives
17 never threatened him or treated him inappropriately. (*Id.* at 89:6-18.) The most the
18 Detectives did was challenge his timeline, but they never asked him to change it or
19 suggested alternative dates. (*Id.* at 90:4-15.) The Detectives only stopped the recording one
20 time - to turn the tape over. (*Id.* at 102:16-103:1.) They did not feed him information or
21 attempt to influence his story when the recorder was off. (*Id.*) Pyszkowski testified at both
22 of Lobato’s criminal trial and told the truth. (*Id.* at 58:10-22.) He offered no evidence of
23 fabricated or withheld evidence.

24 Catherine Reininger also agrees that the Detectives never tried to intimidate her or
25 ask her to lie. (Reininger Depo. at 45:24-46:18, **Exhibit KK.**) All the statements in her
26 voluntary statement are truthful. (*Id.* at 44:14-45:2.) Prior to the recording, she talked to the
27 Detectives about Lobato’s prior sexual trauma as a child, and the Detectives did not ask her

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1 about that information once they started recording. (*Id.* at 45:3.) According to Reininger,
2 she provided her alibi information to Lobato's criminal defense attorneys, but they chose not
3 to call her as a witness. (*Id.* at 55:2-58:1.) She offered no evidence of fabricated or
4 withheld evidence.

5 In sum, Lobato, during discovery, generated no evidence that the Detectives coerced,
6 threatened, intimidated, or otherwise manipulated the witnesses' stories and testimony. All
7 of the witnesses deposed testified that the Detectives treated them fairly and that the story
8 they told the Detectives was truthful and that they were able to testify truthfully at Lobato's
9 criminal trials. No witness has ever implied wrongdoing on the part of the Detectives.

10 ***Fabricated Evidence and Withheld Evidence***

11 According to Lobato's interrogatory answers, the evidence supporting her *Brady*
12 claim is that the Detectives talked to the witnesses (and Lobato) before turning on the
13 recording device. (Ex. CC at Rog Nos. 8 and 9.) As set forth above, none of the witnesses
14 ever testified that the Detectives omitted relevant evidence from their statement,
15 manipulated their statements, or in any way attempted to intimidate them. Further, every
16 alibi witness testified that Lobato's criminal defense attorneys interviewed them and were
17 told what they told the Detectives. During discovery, Lobato failed to generate a single
18 piece of exculpatory evidence that the Detectives withheld from the District Attorney
19 and/or Lobato's criminal defense attorneys. Lobato also claims that the Detectives
20 unconstitutionally influenced the witness' statements. However, each witness testified both
21 their voluntary statements and their later criminal trial testimony was truthful. Plaintiff has
22 provided no evidence of fabricated or withheld evidence. Lobato's own expert witness
23 agrees that all exculpatory evidence told to the Detectives was not only available to Lobato's
24 criminal defense attorneys, but can be found in the Detectives' own Arrest Report. (Ex. DD
25 at 80:10-81:9; *see also* Ex. C.)

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b. **Argument No. 2: The District Attorneys exercised independent judgment.**

Typically, in constitutional tort cases the “[f]iling of a criminal complaint immunizes investigating officers ... because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused’s arrest exists at that time.” *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), overruled on other grounds by *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008). The plaintiff bears the burden of producing evidence to rebut this presumption. *See Newman v. Cty. of Orange*, 457 F.3d 991, 994-95 (9th Cir. 2006). Moreover, the Ninth Circuit held in *Newman* that a plaintiff’s account of the incident, without more, does not overcome the presumption. *Id.* at 994 (citing *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994)). “If charges are filed, *Smiddy* protects the officers unless such evidence shows that officers interfered with the prosecutor’s judgment in some way, by omitting relevant information, by including false information, or by pressuring the prosecutor to file charges.” *Id.* at 995. Deliberately fabricated evidence in a prosecutor’s file can rebut any presumption of prosecutorial independence. *Caldwell*, 889 F.3d at 1116. A plaintiff can overcome the presumption by showing the officers presented the district attorney with “information known by them to be false” or “knowingly withheld relevant information.” *Id.* (citing *Smiddy*, 665 F.2d at 266-67).

Here, the *Smiddy* presumption breaks the chain of causation between Lobato’s alleged fabrication of evidence and the harm that Lobato suffered in being criminally charged. Lobato has failed to identify a single piece of evidence that the Detectives “knowingly fabricated” or “knowingly withheld” from the prosecutor. (*See* Ex. H at 196:2-200:5.) She also admits she has never even been told of such evidence. (*Id.* at 198:21-199:9.) Lobato’s own expert agrees that she is unaware of any “fabricated” or “withheld” evidence in this case, and she is only critical of how the Detectives interpreted and documented the evidence. (Ex. DD 72:21-74:20 & 105:7-106:54 (no opinions of any *Brady*

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1 violations)). It is the expert's opinion that the Detectives did not perform a "thorough
2 investigation" and were "negligent." (*Id.* at 66:3-10.) However, negligence, in general, is
3 not actionable under §1983 because deliberate acts are required. *See Daniels v. Williams*,
4 474 U.S. 327, 328-36 (1986); *Von Williams v. City of Albany*, 936 F.2d 1256, 1260-61 (11th
5 Cir. 1991).

6 Finally, the district attorney who handled both criminal trials, Sandra DiGiacomo,
7 Esq., agrees that she is unaware of any evidence (or any allegation) of the Detectives
8 fabricating evidence, withholding evidence, manipulating evidence, or otherwise influencing
9 the criminal trials. And, she never felt pressure by either detective to bring charges. (Decl.
10 of DiGiacomo, Exhibit LL.) The two criminal trials establish that the state pursued charges
11 based upon the Officer's Report and the district attorney's independent investigation that
12 included the retention of experts, the obtaining of Lobato's medical records, the obtaining of
13 various phone records, and the interviewing of new witnesses not known to the Detectives at
14 the time of the arrest. It is DA DiGiacomo's independent opinion that probable cause
15 existed to arrest and charge Lobato and that probable cause still exists for the charges. (*Id.*)
16 According to DA DiGiacomo, the State declined to try Lobato a third time due to the fact
17 Lobato had served the bulk of her sentence and would be eligible for parole if convicted a
18 third time. (*Id.*; Ex. AA) Thus, the Detectives are immunized from §1983 liability due to
19 the prosecutor's independent judgment.

20
21 **3. The Detectives are entitled to qualified immunity on the
fabrication of evidence claim.**

22 None of the witnesses (or even Lobato) has ever asserted that the Detectives created
23 false statements or fabricated evidence. At most, the witnesses (and Lobato) expressed
24 frustration that the Detectives did not believe their alibi statements. Still, it is undisputed
25 that the Detectives documented the exculpatory evidence and provided it to the District
26 Attorney who then provided it to Lobato's defense attorneys. Lobato admits that she was
27 able to present her alibi story and alibi witnesses to the jury. (Ex. H at 181:11-182:10.)

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1 (Lobato did testify that some witnesses' testimony was limited - but that was the court's
2 decision, not the Detectives' decision.)

3 The Ninth Circuit has never held that failing to believe a witness's story is a
4 constitutional violation. In *Costanich v. Dep't. of Soc. & Health Servs.*, 627 F.3d 1101,
5 1111 (9th Cir. 2010), the court found evidence of intentional fabrication sufficient to survive
6 summary judgment where "witnesses pointed out that the [investigation] report contained
7 evidence of statements they never made." *Id.* at 1112. But, the statements must be provably
8 false as the Ninth Circuit has held that, even if officers are careless with facts or make
9 misstatements, it does not rise to constitutional violation. *Gausvik v. Perez*, 345 F.3d 813,
10 817 (9th Cir. 2003); *see also Caldwell*, 889 F.3d at 1114-15 (issue is whether errors are
11 careless or direct misrepresentations). Here, there is no allegation that the Detectives placed
12 knowingly false statements in their Officer's Report or withheld information from the report.
13 It is undisputed that the Officer's Report identifies both Lobato's alibi witnesses and their
14 story. Lobato is simply upset the jury did not believe her witnesses. Thus, there is no
15 clearly established law that the Detectives' actions in this case could be considered a
16 constitutional violation.

17 **C. COUNT III: 42 U.S.C. §1983 CONTINUED DETENTION WITHOUT**
18 **PROBABLE CAUSE CLAIM.**

19 Lobato's third claim alleges that the Detectives conspired with one another, arrested
20 Lobato without probable cause, and then continued to "perpetuate judicial proceedings
21 against [Lobato] without probable cause . . . [when] they knew [Lobato] was innocent."
22 (ECF No. 1 at ¶153.) Generally, this is a false arrest claim. According to Lobato, the
23 Detectives "fabricated" Lobato's "false confession," while knowing that Lobato "was in
24 Panaca at the time" of the murder and her "confession" involved a "wholly separate event."
25 (Ex. CC at Rog No. 11.)

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1 **1. Relevant Fourth Amendment law.**

2 “The Constitution does not guarantee that only the guilty will be arrested.” *Baker v.*
3 *McCollan*, 443 U.S. 137 (1979). The Fourth Amendment prohibits “unreasonable searches
4 and seizures.” *See* U.S. Const., AMEND. IV. The appropriate inquiry under the Fourth
5 Amendment is an objective one. The question is, would “the facts available to the officer at
6 the moment of the seizure . . . warrant a man of reasonable caution and the belief that the
7 action taken was appropriate?” *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (quotation marks
8 omitted). Any arrest is privileged if it is made pursuant to probable cause. *Id.* The probable
9 cause analysis is the same whether under federal law or Nevada state law. *See Marschall v.*
10 *City of Carson*, 86 Nev. 107, 110, 464 P.2d 494 (1970). When the underlying facts claimed
11 to support probable cause are not in dispute, whether those facts constitute probable cause is
12 an issue of law. *See Ornelas v. United States*, 517 U.S. 690, 696-97 (1996).

13 The District Attorney’s decision not to try the case for a third time in **2017** does not
14 alter the probable cause analysis that existed in **2001**. *See, e.g., Freeman v. Santa Ana*,
15 68 F.3d 1180, 1189 (9th Cir. 1995) (“[T]he mere fact a prosecution was unsuccessful does
16 not mean it was not supported by probable cause.”); *Howell v. Tanner*, 650 F.2d 610, 615
17 (5th Cir. 1981) (“Once probable cause has been established, the legality of the arrest is not
18 affected by . . . a subsequent dismissal or acquittal of the charges”).

19
20 **2. Analysis of Lobato’s Fourth Amendment lack of probable cause**
21 **claim.**

22 Here, it cannot be seriously disputed that the Detectives had probable cause to arrest
23 Lobato.

24 First, Lobato is collaterally estopped from pursuing this claim due to the probable
25 cause finding at Lobato’s preliminary hearing. It is undisputed that a preliminary hearing
26 was held, and the presiding judge found probable cause after hearing testimony from
27 Tienken, Dr. Simms, and Det. Thowsen. (Ex. U at 63-64; Ex. H at 172:3-6.) Lobato admits
that there was no false evidence presented at the preliminary hearing. (Ex. H at 172:18-21.)

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1 This probable cause finding serves as collateral estoppel in this case because Lobato has not
 2 alleged that the probable cause determination was based upon “false testimony or
 3 suppressed facts.” *See Scafidi v. Las Vegas Metro Police Dep’t.*, 966 F.3d 960, 963-64 (9th
 4 Cir. 2020) (Under Nevada law, probable cause determination at a preliminary hearing has
 5 preclusive effect unless evidence of misrepresented facts or manipulated evidence exists).

6 Second, Lobato’s own police practices expert agrees that probable cause existed to
 7 arrest her. (Ex. DD at 34; 51; 54; & 77.) The expert simply boasts she would have done a
 8 better job at establishing probable cause by taking a longer interview. (*Id.* at 53:19-54:12.)
 9 Even Lobato admits that “perhaps” the Detectives had probable cause – but it is her opinion
 10 they still should have looked “further.” (Ex. H at 170:7-21.)

11 Third, this court can determine as a matter of law that probable cause existed for
 12 Lobato’s arrest. The Detectives determined probable cause existed based upon the
 13 following facts:

- 14 • Duran Bailey was violently murdered.
- 15 • Bailey’s penis had been severed from his body with additional injuries to his
 16 face, neck, and abdomen.
- 17 • No knife or other murder weapons were found at the scene.
- 18 • The autopsy determined the cause of death to be blunt force trauma with
 19 multiple stab wounds. The body had been mutilated post-mortem including
 20 the removing of the penis and stab sounds to the anus.
- 21 • On July 20, 2001, Laura Johnson reported second-hand information to Det.
 22 Thowsen that Lobato recently told a second person that she was involved in a
 23 Las Vegas incident where she severed a man’s penis.
- 24 • Lobato was interviewed and reported being attacked by an older black male
 25 in a parking lot. Although Lobato reported a different location of the attack
 26 (the east side of Las Vegas), she “appeared unsure” because of drug use and
 27 unfamiliarity with the city. Lobato reported using a butterfly knife to cut the
 man’s penis and possibly sever it. She reported leaving the man on the
 ground, fleeing in her vehicle, getting rid of the knife and her clothes, and
 hiding her car. Lobato also told the Detectives, “I didn’t think anyone would
 miss him.”
- After the interview, Lobato told the Detectives that the incident occurred in
 an enclosed area similar to the CCDC jail cell.

(Arrest Report, **Exhibit MM.**)

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1 Based upon these known facts, the Detectives made the decision that a “fair
2 probability” existed that Lobato committed the murder of Bailey. The District Attorney,
3 preliminary hearing judge, trial judge, two juries, and the Nevada Supreme Court all agree,
4 as none of these individuals or entities has ever found that probable cause was lacking to
5 arrest Lobato.

6 Because probable cause existed to arrest Lobato, her false arrest claim necessarily
7 fails, as does her unlawful detention claim. *See Lacy v. County of Maricopa*, 631 F.Supp.3d
8 1183, 1195 (D.Az. 2008).

9 **D. COUNT IV: 42 U.S.C. §1983 FAILURE TO INTERVENE.**

10 Lobato’s fourth claim is a §1983 failure to intervene claim. She alleges that the
11 Detectives “each stood by without intervening to prevent the violation of [Lobato’s]
12 constitutional rights, even though they had the opportunity to do so.” (ECF No. 1 at ¶161.)

13 **1. Relevant failure to intervene law.**

14 A failure to intervene (a/k/a failure to intercede) claim is a subpart of the Fourth
15 Amendment right to be free of excessive force. *Cunningham v. Gates*, 229 F.3d 1271, 1289
16 (9th Cir. 2003) (“police officers have a duty to intercede when their fellow officers violate
17 the constitutional rights of a suspect or other citizen”). Generally, a failure to intervene
18 claim exists when bystander officers have an opportunity to intervene, but fail to do so.
19 *Lolli v. Cty. of Orange*, 351 F.3d 410, 418 (9th Cir. 2003). “[T]he constitutional right
20 violated by the *passive* defendant is analytically the same as the right violated by the person
21 who [uses excessive force].” *U.S. v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994) *rev’d in*
22 *part on other grounds*, 518 U.S. 81 (1996) (emphasis added). “Importantly, however,
23 officers can be held liable for failing to intercede only if they had an opportunity to
24 intercede.” *Cunningham v. Gates*, at 1290.

25 The Ninth Circuit has only recognized a claim for failing to intervene in the
26 excessive force context. Police officers do not have a general duty to intervene in all alleged
27 wrongdoings by a fellow officer. *Briscoe v. Madrid*, 1:17-CV-0716-DAD-SKO, 2018 WL

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1 4586251, at *5 (E.D. Cal. Sep. 21, 2018); *Dental v. City Salem*, No. 3:13-CV-01659-MO,
 2 2015 WL 1524476, at *5 (D. Or. Apr. 2, 2015). The duty to intercede is “clearly limited to
 3 the context of excessive force” claims under the Fourth Amendment. *Dental*, 2015 WL
 4 1524476, at *5 (finding that the duty to intercede did not apply to the plaintiff’s wrongful
 5 arrest claim); *Gillette v. Malheur Cty.*, 2:14-CV-01542 -SU, 2016 WL 3180228, *7 (D. Or.
 6 2016); *Milke v. City of Phoenix*, No. CV-15-00462-PHX-ROS, 2016 WL 5339693 (D.Az.
 7 Jan. 8, 2016) (no duty to intervene outside of excessive force context).

8 **2. Analysis of Lobato’s failure to intervene claim.**

9 Lobato’s failure to intervene claim requires plaintiff to first prove a substantive
 10 constitutional violation. Because Lobato has failed to do so, this claim fails. In addition,
 11 this is not an excessive force case, and, therefore, no general duty to intercede claim even
 12 exists.

13 Because this circuit has never recognized a duty to intervene in a case such as this, at
 14 a minimum, the LVMPD Defendants are entitled to qualified immunity because there is no
 15 clearly established law that the individual defendants had a duty to intercede under these
 16 facts.

17 **E. COUNTS V AND IX: 42 U.S.C. §1983 CONSPIRACY CLAIM AND**
 18 **STATE LAW CONSPIRACY CLAIM.**

19 Lobato’s fifth claim and ninth claims allege that the Detectives conspired to violate
 20 her rights. She claims the Detectives conspired amongst each other “to frame” Lobato and
 21 “agreed to investigate and to exert influence to cause the prosecution of Plaintiff for a crime
 22 she did not commit.” (ECF No. 1 at ¶ 166 & 190-193.) This claim is based upon Lobato’s
 23 belief the Detectives “coerced” her confession and manipulated witness statements.

24 **1. Relevant conspiracy law.**

25 To establish a cause of action for conspiracy under §1983, a plaintiff must present
 26 facts sufficient to demonstrate: (1) the existence of an express or implied agreement among
 27 the defendant officers to deprive a person of his constitutional rights, and (2) an actual

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1 deprivation of those rights resulting from that agreement. *Ting v. United States*, 927 F.2d
2 1504, 1512 (9th Cir. 1991). One can infer an agreement from the defendant's acts pursuant
3 to the conspiratorial scheme or from other circumstantial evidence. *Id.* at 1170.
4 "Conspiracy is not an independent basis of liability in a § 1983 actions." *Smith v. Gomez*,
5 550 F.3d 613, 617 (7th Cir. 2008). Thus, the failure to prove a substantive constitutional
6 injury precludes relief on a conspiracy claim. *Cefalu v. Village of Elk Grove*, 211 F.3d 416,
7 423 (7th Cir. 2000).

8 Similarly, in Nevada, "[a]n actionable civil conspiracy consists of a combination of
9 two or more persons who, by some concert of action, intend to accomplish an unlawful
10 objective for the purpose of harming another, and damage results from the acts."
11 *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256
12 (Nev. 1988) (citations omitted).

13 **2. Analysis of Lobato's civil conspiracy claim.**

14 First, Lobato must provide evidence of an underlying constitutional violation or tort
15 before this claim need be addressed. As set forth above, Lobato has not established an
16 independent constitutional violation. Therefore, because no constitutional violation
17 occurred, this claim fails as matter of law.

18 Second, there is no evidence the Detectives conspired with one another. Neither of
19 Lobato's experts issued any opinions even suggesting the officers knowingly conspired to
20 deprive Lobato of her rights. With respect to Lobato's recorded interview, Lobato testified
21 that her statement is truthful and that the Detectives did not elicit any false statements or try
22 to influence her statement. (Ex. H at 136-137.) Further, not a single witness has ever
23 testified that the Detectives coerced them into giving a false statement or misrepresented
24 their story. And, Lobato's own expert agrees that the Detectives' Officer Report and the
25 witnesses' voluntary statements contain all the exculpatory evidence. (Ex. DD at 80-81.)
26 As discussed *ad nauseum* above, Lobato's real allegation is that the Detectives erred in this
27 case because they *misunderstood or misinterpreted* her confession—not that they coerced a

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1 false confession—and that they conducted a negligent (not an intentionally false)
2 investigation. (Ex. DD at 66 & 92 -93; Ex. H at 138-139, 141, 196.) The fact that the
3 Detectives (and two criminal juries) interpreted Lobato’s statement and her alibi witness’
4 statements differently, is not a valid basis for a civil conspiracy claim.

5 Third, even if a conspiracy occurred between the Detectives, the claim is barred by
6 the intra-corporate conspiracy doctrine, which states that a conspiracy requires agreement
7 between two or more persons or distinct business entities, would bar such a claim. *See*
8 *Rabkin v. Dean*, 856 F.Supp. 543, 550-52 (N.D. Cal. 1994) (applying doctrine in §1985
9 case); *Hofmann v. City and Cty. of San Francisco*, 870 F.Supp.2d 799, 809 (N.D. Cal.
10 2012). The doctrine provides that, as a matter of law, an entity cannot conspire with its own
11 employees or agents. The Ninth Circuit has not expressly addressed whether the doctrine
12 applies either to government entities or to civil rights claims. *Id.* District courts have
13 extended the doctrine to §1983 claims. *See Stuart v. City of Scottsdale*, 2021 WL 977166,
14 *6 (D.Az. March 16, 2021) (Civil rights allegations “fall squarely within the intracorporate
15 conspiracy doctrine” and “[w]here the individual defendants are all employees of the
16 institutional defendant, a claim of conspiracy will not stand.” (citations omitted));
17 *Hasbrouck v. Yavapai Cty.*, 2021 WL 321894, *15 (D. Az. Feb. 1, 2021) (“district courts [in
18 the Ninth Circuit] that have addressed the issue consistently have held that it does apply”);
19 *Ruble v. Escola*, 898 F.Supp.2d 956, 986 (N.D. Ohio 2012) (applying the doctrine to both
20 federal law and Ohio state law conspiracy claims).

21 At a minimum, the Detectives enjoy qualified immunity on the issue because the law
22 is not clearly established as to whether such a claim exists. *See Fazaga v. FBI*, 965 F.3d
23 1015, 1060 & n.41 (9th Cir. 2020) (qualified immunity barred claim because there is not
24 clearly established Ninth Circuit law on whether “an intracorporate agreement could subject
25 federal officials to liability under § 1985(3)”).

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1 **F. COUNT VI: STATE LAW MALICIOUS PROSECUTION.**

2 Lobato's sixth claim alleges state law malicious prosecution against the Detectives.
3 She claims the Detectives "instituted or continued the prosecution of [Lobato] without
4 probable cause." (ECF No. 1 at ¶174.)

5 **1. Relevant malicious prosecution law.**

6 A malicious prosecution claim can be maintained not only against prosecutors, but
7 also against others – including police officers and investigators – who wrongfully caused the
8 prosecution. *See Smith v. Almada*, 640 F.3d 931, 938 (9th Cir. 2011) (citing *Galbraith v.*
9 *Cnty. of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002)). In Nevada, the elements of a
10 malicious prosecution claim are: "(1) want of probable cause to initiate the prior criminal
11 proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage."
12 *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877 (2002). The standard for a state law claim
13 is the same as federal law malicious prosecution claim. *See Lassiter v. City of Bremerton*,
14 556 F.3d 1049, 1054-55 (9th Cir. 2009). ("[P]robable cause is an absolute defense to
15 malicious prosecution." *Id.* at 1054-55.)

16 "Ordinarily, the decision to file a criminal complaint is presumed to result from an
17 independent determination on the part of the district attorney, and thus, precludes liability
18 for those who participated in the investigation or filed a report that resulted in the initiation
19 of proceedings." *Awabdy v. City of Adalanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (citing
20 *Smiddy v. Varney*, 665 F.2d 261, 266-68 (9th Cir. 1981)). However, "the presumption of
21 prosecutorial independence does not bar a subsequent section 1983 claim against state or
22 local officials who improperly exerted pressure on the prosecutor, knowingly provided
23 misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful
24 or bad faith conduct that was actively instrumental in causing the initiation of legal
25 proceedings." *Id.*; *see also Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997)
26 (holding that a probable cause determination "that is 'tainted by the malicious actions of the
27

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1 government officials [involved]' does not preclude a claim against the officials involved.")
 2 (quoting *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988)).

3 **2. Analysis of Lobato's malicious prosecution claim.**

4 Lobato's state-law malicious prosecution claim fails because the Detectives had the
 5 requisite probable cause to arrest her. The analysis is identical to Lobato's §1983 unlawful
 6 detention claim addressed *supra* in Section IV(C).

7 In addition, there is no evidence of malice. "In order to prove malice, it must be
 8 shown that the defendant knew that the statement was false or acted in reckless disregard of
 9 its truth or falsity." *Rowland v. Lepire*, 313 P.2d 1332, 1335 (Nev. 1983). Lobato has not
 10 identified any statement made by either detective that was knowingly false or reckless. In
 11 fact, Lobato believes the Detectives were "fair" with her. (Ex. H at 162.) She is only upset
 12 with the manner the Detectives interpreted her voluntary statement. (*Id.* at 169 & 199-200.)
 13 She also admits she has no evidence that the Detectives improperly coerced any of her alibi
 14 witnesses. (*Id.* at 197-198.)

15 **G. COUNT VII: STATE LAW ABUSE OF PROCESS.**

16 Lobato's seventh claim is for state law abuse of process. She claims the Detectives
 17 "exerted influence to continue the criminal proceeding . . . with an ulterior purpose other
 18 than resolving a legal dispute or resolving guilt or innocence of [Lobato] in the murder of
 19 Duran Bailey." (ECF No. 1 at ¶180.)

20 **1. Relevant abuse of process law.**

21 "Abuse of process is a tort recognized to provide a remedy for cases in which legal
 22 procedure has been set in motion in proper form, with probable cause, but nevertheless has
 23 been perverted to accomplish an ulterior purpose for which it was not designed." *Rashid v.*
 24 *Albright*, 818 F. Supp. 1354, 1358 (D. Nev. 1993) (citing Prosser & Keaton, LAW OF TORTS
 25 896 (1984)). The essence of the tort of abuse of process is the use of the legal system to
 26 accomplish some end which is without the regular purview of the process, or which compels
 27 the party against whom it is used to do some collateral thing which he could not legally and

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1 regularly be required to do. *See Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994). To
 2 successfully state a claim for abuse of process under Nevada law, a plaintiff must allege:
 3 (1) the defendant had an ulterior purpose in the underlying lawsuit other than resolving a
 4 legal dispute, and (2) the defendant willfully and improperly used the legal process to
 5 accomplish that purpose. *LaMantia v. Redisi*, 38 P.3d 877, 880 (Nev. 2002). An action for
 6 abuse of process hinges on misuse of regularly issued process. *Dutt v. Kremp*, 844 P.2d 786,
 7 790 (Nev. 1992) (internal citations omitted), *overruled on other grounds by LaMantia v.*
 8 *Redisi*, 38 P.3d 877 (Nev. 2002); *Mirch v. Clifton*, 2015 WL 6681231, *5 (Nev. 2015)
 9 (citing *Nev. Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601, 606, 503 P.2d 9, 12
 10 (1972)).

11 The Nevada Supreme Court has stated that an “ulterior purpose” includes any
 12 improper motive underlying the issuance of legal process. *Dutt*, 844 P.2d at 790. However,
 13 there is no liability when the defendant has done no more than carry out the process to its
 14 authorized conclusion, even if he or she does so with bad intentions. *See generally*, Prosser,
 15 LAW OF TORTS, § 121, 857 (4th ed. 1971). Unless a plaintiff points to evidence that the
 16 officers were motivated by some collateral objective, the existence of probable cause
 17 constitutes a defense to an action for abuse of process. *Shiels v. City of New York*, 141 A.D.
 18 3d 421, 422, 35 N.Y.S. 3d 330 (1st Dept. 2016).

19 2. Analysis of Lobato’s abuse of process claim.

20 Here, there is no evidence that either detective used the legal process in an improper
 21 manner in the regular conduct of the proceeding and Lobato has not generated any evidence
 22 of an “ulterior purpose by the defendants” to arrest her. *See Posadas v. City of Reno*,
 23 851 P.2d 438, 445 (Nev. 1993); *Bull v. McCuskey*, 615 P.2d 960 (Nev. 1980) (attorney
 24 knowingly filed frivolous lawsuit in hopes of coercing a nuisance settlement). In *Posadas*
 25 the plaintiff avoided summary judgment by making “a sufficient showing . . . [by]
 26 present[ing] to the district court sufficient evidence that criminal charges were brought
 27 against him for the purpose of forcing his resignation. (*Id.* at 851 at 445.)

1 Lobato has generated no evidence showing the Detectives had an ulterior motive in
2 arresting her. She has not identified an “ulterior purpose” beyond a regular criminal arrest.
3 The evidence is also clear that once Lobato was arrested, all decisions regarding the
4 prosecution of Lobato were controlled and made by the District Attorney’s office. The
5 Detectives simply allowed the District Attorney to carry out the charges against Lobato to its
6 authorized conclusion. (Ex. LL.)

7 H. COUNT VIII: STATE LAW IIED.

8 Lobato’s eighth claim is a state law IIED claim. She claims that all of the actions
9 discussed above caused her to suffer emotional distress. (ECF No. 1 at ¶185.) It appears
10 that Lobato’s IIED claim is based upon her belief that the Detectives fabricated evidence,
11 withheld evidence, and “framed” her for the murder of Bailey.

12 1. Relevant IIED law.

13 The elements of an IIED claim are “(1) extreme and outrageous conduct with either
14 the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff having
15 suffered severe or extreme emotional distress, and (3) actual or proximate causation.” *Star*
16 *v. Rabello*, 97 Nev. 124, 625 P.2d 90, 91-92 (1981). Analysis of Lobato’s IIED claim.

17 2. Analysis of Lobato’s IIED complaint.

18 Lobato’s IIED claim is predicated upon her first establishing that the Detectives
19 violated her federal-law and/or state-law rights. There is no evidence of “extreme or
20 outrageous” conduct on behalf of the Detectives as Lobato has failed to deliver any evidence
21 that the Detectives did anything wrong – let alone “extreme or outrageous.” Lobato, herself,
22 testified that she felt the Detectives were “fair” with her. (Ex. H at 162:7-21.) And, her own
23 expert only concluded that the Detectives were, at most, negligent and not thorough. (Ex.
24 DD at 66:3-10.)

25 I. COUNT X: INDEMNIFICATION.

26 Lobato’s final claim for relief is one for “indemnification.” (ECF No. 1 at ¶¶195-
27 197.) This is not a claim for relief under federal or state law. *See e.g., Sims v. City of*

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Columbus, 2013 WL 3394001, n.2 (S.D. Ohio July 8, 2013). In Nevada, NRS 41.0349 governs the indemnification of public officers. Indemnification is required unless the official acted outside the course and scope of his employment and/or “the act or omission of the person was wanton and malicious.” (*Id.*)

V. CONCLUSION

Based upon the above, the LVMPD Defendants request summary judgment on all claims.

Dated this 28 day of June, 2021.

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By: 

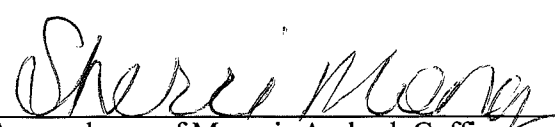
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LVMPD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 28th day of June, 2021.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:


An employee of Marquis Aurbach Coffing